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Supreme Court of the United States

October Term, 1958

No. 893

MICHELE MIRANDA,

Petitioner,

—against—

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, BY MYLES J. LANE, CHAIRMAN, JACOB GRUMET, JOHN W. REGAN, JR., GOODMAN A. SARACHAN, Commissioners

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Supreme Court of the United States

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No.

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—against—

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, BY MYLES J. LANE, CHAIRMAN, JACOB GRUMET, JOHN W. REGAN, JR., GOODMAN A. SARACHAN, Commissioners,

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

A. The Opinions Below.

No opinion was written at Special Term of the Supreme Court of the State of New York. The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, is reported in 7 A. D. 2d 48, 180 N. Y. S. 2d 496. Said opinion is appended hereto. The

Court of Appeals of the State of New York rendered no opinion, but stated:

> "Orders affirmed (Knapp v. Schweitzer, 357 U. S. 371, 380-381). No opinion, all concur."

The foregoing is not yet reported officially or unofficially, but appears in the New York Law Journal, March 17, 1959, at page 10.

By order dated April 9, 1959, the Court of Appeals granted a motion by petitioner to amend its remittitur as follows:

> "Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:
>
> 'Upon the appeals herein on behalf of the appellants there were presented and necessarily passed upon the following questions, viz:
>
> '1. Whether the procedure whereby the appellants were committed violated the due process clause of the Fourteenth Amendment to the United States Constitution;
>
> '2. Whether the privileges and rights of the appellants not to be compelled to incriminate themselves under the Fifth Amendment to the United States Constitution, were improperly infringed; and
>
> '3. Whether the over-all effects of the proceedings violated the due process clause of the Fourteenth Amendment to the United States Constitution and the Fifth and Eighth Amendments to the United States Constitution.
>
> 'This court held that the rights and privileges of these appellants under the United States Constitution were not infringed or violated.' "

This decision has not yet been reported, officially or unofficially, but appears in the New York Journal of April 13, 1959, at page 12.

B. Grounds on Which Jurisdiction of This Court is Invoked.

1. The order of the Court of Appeals of the State of New York sought to be reviewed was made and entered on March 13, 1959.

2. There was no order respecting a rehearing or granting an extension of time to file this petition.

3. The statutory provision believed to confer jurisdiction on this Court to review the order in question by writ of certiorari is 28 U. S. C. Section 1257(3).

C. Questions Presented.

1. Were the privileges and rights of the petitioner not to be compelled to incriminate himself, under the Fifth Amendment to the United States Constitution, improperly infringed by requiring him to answer questions which might incriminate him for Federal crimes, without any grant of immunity as to such crimes, where he was currently the subject of Federal investigations, where a Federal investigator was present at his questioning before the State Commission of Investigation, and where such State Commission was charged by statute with the duty of investigating crimes against the Federal government and reporting evidence thereof to the proper prosecuting authorities?

2. Was the petitioner denied due process of law in violation of the due process clause of the Fourteenth Amendment to the United States Constitution by reason of the fact that he did not receive reasonable opportunity to oppose, at Special Term of the Supreme Court of New York, the application to commit him until he should answer interrogatories put by the State Commission of Investigation?

3. Did the overall effects of the proceedings in the New York State Supreme Court violate the due process clause of the Fourteenth Amendment to the United States Constitution, and the Fifth and Eighth Amendments to the United States Constitution, in that the petitioner has been ordered incarcerated until he answers, "truthfully and responsively", questions which may incriminate him under Federal law, without being accorded immunity in the Federal jurisdiction?

D. Constitutional Provisions and Statutes Involved.

The Constitutional provisions and statutes involved are:

1. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution;

2. Section 406, New York Civil Practice Act;

3. New York Laws of 1958, Chapter 989, Section 2, Subdivisions 1, 5 and 7, and Section 7;

4. New York Penal Law, Section 2447, Subdivisions 1 and 2.

All of the foregoing are set forth in the Appendix to this petition.

E. Statement of Facts.

The Commission of Investigation, the respondent herein, is a body created by Chapter 989 of the Laws of New York, 1958 (New York Unconsolidated Laws, Sections 7051-7057).

The Commission is empowered to investigate, among other things, "Any matter concerning the public peace, public safety and public justice" (*id.*, §2, Subdivision 1). The Commission is specifically directed by statute to "cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state" (*id.*, §2, Subdivision 5).

It is further enacted that "Whenever it shall appear to the commission that there is cause for the prosecution for a crime, . . . the commission shall refer the evidence of such crime . . . to the officials authorized to conduct the prosecution . . . ." (*id.*, §2, Subdivision 7).

Finally, Section 7 of Chapter 989 provides that immunity from prosecution [by New York State only, of course] shall be accorded to any witness who claims his privilege, but who is nevertheless required to answer.

Acting pursuant to the powers granted to it by Chapter 989 of the Laws of 1958, the Commission instituted an investigation of a now-famous gathering which took place at Apalachin, New York, on November 14, 1957. It alleged that many of the persons there present had criminal records (72-3, 386-7).*

The Chairman stated that the Commission intended "to find out whether the crimes of conspiracy, violation of Sec-

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* Rererences in parentheses, unless otherwise indicated are to folios of the printed record on appeal in the State Court.

tion 340 of the General Business Law, which pertains to monopoly and restraint of trade, bribery of public officials or any other crimes were committed or planned at this meeting" (485).

The petitioner was served with a subpoena by the Commission on August 4, 1958 (896); he appeared on August 15, 1958 (*id.*); and was asked a series of questions as to what transpired at Apalachin (601-14); he refused to answer them on the grounds that he might thereby incriminate himself (*id.*).

The Commission proceeded to accord him immunity from State prosecution pursuant to its powers under the State statute (614-21). Through counsel and personally, he objected on the grounds of his Constitutional privilege against self-incrimination, pointing out various matters which are dealt with in Section F, *infra* (626-63).

Petitioner's questioning before the Commission was concluded at about noon on August 15, 1958, when he was directed to return at 2 P.M. of the same day (663-5). At that time he was served with an order to show cause returnable "forthwith" (58-62, 890-1).*

The hearing commenced at 2:38 P.M. (891). An application for a reasonable adjournment to afford counsel an opportunity to submit answering affidavits was denied (891). The transcript of the testimony before the Commission, which was apparently typed during the luncheon

* The order to show cause and moving affidavit applicable to this petitioner is not printed in the record, but is similar to one which appears therein; by stipulation, this order to show cause was treated as the prototype in all of the companion cases, of which this petitioner's was one (37-42).

recess, was received in evidence (894-5), and the Justice at Special Term proceeded immediately to find that petitioner had, "without reasonable cause", refused to answer legal and pertinent questions which were set forth in the transcript, and accordingly he directed the witness' immediate incarceration, to continue until such time as he should answer, "truthfully and responsively", the questions which he had refused to answer at the hearing before the Commission (52q-57, 895-7).

We note that the moving affidavit did not set forth the questions which petitioner had refused to answer, but merely stated that "various material and relevant questions concerning the organization, participants, purposes and discussions at the Apalachin Meeting were directed to the witness", and that he had "refused to answer many pertinent questions put to him . . ." (78-9). No transcript of the testimony was annexed to the affidavit, but the affidavit stated that copies of such transcript would be submitted to the court and delivered to the witness (83). While the record does show that the transcript was received in evidence (894-5), the record does not disclose that any copy was ever delivered to the petitioner or his counsel, who noted that he was appearing specially (890-4).

Pursuant to the order at Special Term, petitioner has been continuously incarcerated, without bail, since August 15, 1958.

F. Timely Raising of Federal Questions.

Petitioner raised the Federal Constitutional questions relied upon here at an early stage of the proceedings, to wit, when he was subpoenaed before the State Commission

and appeared there. At that time, he objected to the questions on the ground that his Constitutional rights not to be compelled to incriminate himself were infringed by requiring him to answer, after being accorded only a grant of immunity limited to protection from prosecution by New York State (626-63). Through counsel, he stated that he challenged

> "the grant of immunity upon the ground that . . . [it] is not as broad and is not coextensive with his privilege against self-incrimination. Chapter 989 of the laws of 1958, Section 2, subdivision 4 and 5, require the Commission to cooperate with District Attorneys and law enforcement officers upon their request and, more particularly, subdivision 5 requires the Commission to cooperate with departments and officers of the United States Government in this investigation with respect to violation of the federal laws within the state . . .
>
> "I therefore say that his right under the State Constitution, Article 1, Section 6, and the Federal Constitution, the Fifth Amendment to the said Constitution, protect this man and that he is being deprived of due process under the Constitution of the State of New York and under the Fourteenth Amendment to the Constitution of the United States" (627-30).

His counsel also stated:

> "I further wish to place upon the record the fact that this man is presently under subpoena by a Senate commission, namely, the Select Committee on Improper Activities in the Labor and Management Field. He is under subpoena by the Federal Grand Jury for the Southern District of New York and has appeared before that body on several occasions; . . . and for the above reasons I respectfully urge that

this Commission has no power to grant him the immunity which is co-extensive with his privilege against self-incrimination" (630-2).

In addition, it should be noted that a representative of the aforementioned Senate Committee was present at the hearing (523-4). None of the foregoing statements of fact was challenged.

This claim of right was before the court when it acted at Special Term (895).

With respect to the violation of the due process clause of the Fourteenth Amendment, insofar as the unseemly haste of the proceedings was concerned, petitioner did not specifically claim his rights under the Fourteenth Amendment either at the Commission hearing or shortly thereafter at Special Term, although at Special Term he did protest the speed and asked for a reasonable adjournment for the purpose of submitting affidavits (890-1). However, in the Appellate Division, and in the Court of Appeals, the question of the undue haste and lack of opportunity to defend was presented to the court, and passed upon, with relation to violation of his rights under the Fourteenth Amendment. (Appellate Division opinion, 7 App. Div. 2d 48, at page 57; and Amendment to Remittitur by the Court of Appeals, quoted *supra*).

H. Argument of Reasons Relied Upon in Support of Petition.

1. Widespread applicability of problems involved herein.

What was accomplished in the instant case was the indefinitely-prolonged jailing of persons thought to be criminals, without a single iota of proof of wrong-doing on their

part, solely because they claimed their privilege under the Constitution, and refused to incriminate themselves as to Federal offenses. Such result is not an accidental or unintended consequence, but rather represents a carefully thought-out policy which amounts to a modern-day equivalent of the Vigilantes, seeking to imprison or expel those suspected of wrongdoing, without the inconvenience of convicting them. The Commission itself boasts of this policy, and states that it will be expanded in every direction.* It is imperative that this Court establish the Constitutional invalidity of such procedures before they become firmly ingrained as a part of our law.

2. Petitioner's rights under the Fifth Amendment were infringed.

The New York State courts have determined a fundamental question affecting the rights of citizens to be secure

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* In its "First Report" to the New York Governor and Legislature, Feb. 1959 (N. Y. Leg. Doc. [1959] No. 102), the Commission reported as follows concerning this very case:

> "The importance of the decisions rendered to date in these matters cannot be emphasized too strongly. The significance of the Commission's accomplishment in these matters lie in the fact that this was the first time that the participants at the Apalachin Meeting have not been allowed to come through a revolving door into a hearing and back home again; this time, they went from the hearing to jail where they will remain until they comply with the order of the court. [p. 13]
>
> * * *
>
> "The Commission believes that its investigation in this matter has accomplished much in establishing a new and aggressive approach with respect to underworld characters who refuse to give essential testimony. It has also helped materially in forcing many of these long entrenched underworld leaders to leave the State of New York and, thus, has disrupted their smooth operations in fields inimical to the public welfare and safety." [p. 14]

against self-incrimination in a way which appears to be contrary to the opinions of this Court in *United States* v. *Saline Bank* (1828), 1 Pet. 100; and *Ballman* v. *Fagin* (1906), 200 U. S. 186, 195. In addition, the precise issue raised herein has never been squarely decided by this Court, but was expressly left open in the recent case of *Knapp* v. *Schweitzer* (1958), 357 U. S. 371, 379-380.

Our contention here is not that the New York immunity laws are unconstitutional *per se*, but that the application of those laws to the facts in the case at bar produces an unconstitutional result inimical to the provisions of the Fifth Amendment.

This case is unique in that the hearing at which the petitioner was called upon to testify was before a State authority which had as one of its statutorily-mandated purposes, the uncovering of *Federal* crimes and the conveying of the evidence of crimes so uncovered to the proper *Federal* prosecuting authorities. Only one reported case deals with a situation where an investigating body, armed with the power of subpoena and the right to grant immunity, had as a *principal purpose* the uncovering of crimes against a *different sovereign*. (*United States* v. *Di Carlo* [D. C. N. D. Ohio E. D. 1952], 102 F. Supp. 597). In that case, the court held that it was not contempt for a witness immunized in only one jurisdiction to refuse to answer questions which would incriminate him in another. This holding was in accord with the reasoning of both the *Saline Bank* case and *Ballmann* v. *Fagin, supra.* This unique factor of making the scope of an investigation by one jurisdiction specifically include as a *purpose* and not merely as an *incident* the uncovering of crimes against another sovereign, sufficiently distinguishes the case at bar from cases like *United States* v. *Murdock* (1931), 384 U. S. 141.

All the decisions of this Court which have held that a State grant of immunity in a State investigation will compel answers even though those answers may expose the witness to prosecution in another jurisdiction involved a *State purpose for the inquiry* and revelations of cases of crimes against other sovereigns, were merely *incidental, unintended and secondary consequences* (*e.g., Knapp* v. *Schweitzer, supra,* 357 U. S. 371; *Jack* v. *Kansas* [1905], 199 U. S. 372).

The converse situation—an immunized witness in the Federal jurisdiction being compelled to give evidence which might incriminate him in a State proceeding is typified by the *Murdock* case, *supra,* 284 U. S. 141. There, this Court expressly recognized that its decision rested on a finding that the Federal inquiry was *for Federal purposes and was not designed to aid the State authorities* (284 U. S., at page 149).

Throughout all of the decided cases, there is recognition of the principle that a witness immunized by a jurisdiction which seeks his testimony may be required to give such testimony only if the resultant danger of prosecution for crimes against another sovereign is an unintended consequence—"remote", and "not imminent". Where there is a real and present danger of prosecution in the other jurisdiction for crimes not immunized, the Constitutional rights of the witness come into play and his privilege of silence will be recognized. Uniformly, this has been the result at common law, in this Court, and in State Courts. (*King of the Two Sicilies* v. *Wilcox,* 1 Sim. [n. s.] 301, 61 Eng. Rep. 116 [Ch. 1851]; *cf. United States* v. *McRae,* L. R. 3 Ch. 79 [1867]; *Queen* v. *Boyes* [1861] 1 B. & S. 211, 329, 330. See,

also, *Knapp* v. *Schweitzer, supra,* 357 U. S. 371; *U. S.* v. *Murdock, supra,* 284 U. S. 141; *Hale* v. *Henkel* [1906] 201 U. S. 43; *Ballmann* v. *Fagin, supra,* 200 U. S. 186; *Jack* v. *Kansas, supra,* 199 U. S. 372; *Brown* v. *Walker* [1896] 161 U. S. 591; *United States* v. *Saline Bank, supra,* 1 Pet. 100. See, also, *Comm.* v. *Rhine* [1957, Ky.] 305 S. W. 2d 301; *Lorenzo* v. *Blackburn* [1954, Fla.] 74 So. 2d 289, 291; *State* v. *Kelly* [1954, Fla.] 71 So. 2d 887, 895-897; *State ex rel. Doran* v. *Doran* [1949] 215 La. 151; 30 So. 2d 894; *State* v. *Dominguez* [1955] 228 La. 284, 82 So. 2d 12; *People* v. *Den Uyl* [1947] 318 Mich. 645.)

The recent decision in *Knapp* v. *Schweitzer, supra,* 357 U. S. 371, did not, we believe, foreclose our present contention. There, this Court held that the claim of imminent danger of prosecution in the Federal jurisdiction resulting from immunized and enforced testimony before a State grand jury was not factually borne out by the record. The Court expressly left open the question which might arise if a real, evidentiary showing were made that an imminent Federal prosecution would result, or that there was a "joint state and federal endeavor" (*id.,* page 380). As this Court read the record in that case, it was "barren of evidence that the State was used as an instrument of federal prosecution or investigation".

In the case at bar, on the other hand, the plain words of the State statute make it the duty of the State Commission to investigate Federal crimes and turn over evidence of such crimes to the Federal authorities (L. 1958, Chapter 989, Section 2, subdivisions 5, 7). In addition, this petitioner had, at the time he was questioned, already appeared before a Federal grand jury which was investigating him; was still under subpoena to that grand jury; a Federal

agent was present at the Commission's open hearing; and a Federal Senate Committee was interested in obtaining his testimony. In the circumstances, it is clear that there was here that clear demonstration of a "joint State and Federal endeavor" lacking in the *Schweitzer* case (*Cf. Knapp* v. *Schweitzer, supra,* 357 U. S., at page 380); here, clearly, the State was used as "an instrument of federal prosecution or investigation."

Moreover, reference to what was argued by the successful party in the *Knapp* case proves convincingly that it was only "a bare possibility" of jeopardy—not an imminent danger—in another jurisdiction which was there involved (District Attorney's brief, *Knapp* v. *Schweitzer, supra,* in this Court, pages 9-10, 11, 17, 18).

It seems inconceivable that a citizen living perforce in the co-terminous territory of both the Federal and State Governments, and protected in *both* jurisdictions by identical provisions of the Constitutions of both sovereigns from self-incrimination, can properly be "whipsawed into incriminating himself . . . even though there is a privilege against self-incrimination in the Constitution of both" (BLACK, *J.*, dissenting in *Knapp* v. *Schweitzer, supra,* 357 U. S. 371, 385). We submit that provisions like these, intended as a shield, should not be turned into destructive weapons contrary to the intention of their framers, by the device of empowering and requiring State officials to investigate Federal crimes, or vice versa. The ingenuity of prosecutors in devising clever ways to circumvent constitutional rights should not be permitted to crumble away the fundamental liberties. This Constitutional provision is not to be interpreted "in a hostile or niggardly spirit" (*Ullmann* v *United States* [1956], 350 U. S. 422, 426).

Recent cases (*Abbatte* v. *United States*, — U. S. — [27 Law Week 4225], and *Bartkus* v. *Illinois*, — U. S. — [27 Law Week 4233]), lend force to our contention, by emphasizing the fact that the same act may constitute a crime in both the Federal and State jurisdictions and be prosecuted in both.

Finally, the decision of *Feldman* v. *United States* (1944) 322 U. S. 487, indicates clearly that testimony enforced from a witness in circumstances like that at bar can be used against him in the Federal jurisdiction.

3. The procedure violated due process of law.

This petition presents another important question not heretofore decided by this Court, to wit, whether it is consonant with due process of law not to give petitioner a reasonable opportunity to oppose an application to imprison him until he answers questions. The decision below is inconsistent in this respect with decisions of this Court in the closely related field of contempt. (*Cooke* v. *United States* [1925] 267 U. S. 517; *Re Oliver* [1948] 333 U. S. 257.)

The proceedings herein were brought pursuant to Section 406, Subdivision 3 of the New York Civil Practice Act, the material portions of which read as follows:

> "If the person subpoenaed and attending . . . before an officer or other person or a body refuses without reasonable cause . . . to answer a legal and pertinent question . . . the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts, by warrant commit the offender to jail,

> there to remain until he submits to do the act which he was so required to do or is discharged according to law."

It is apparent from a reading of this subdivision that two separate types of proceedings are contemplated. Where the refusal to answer is before a judge, he may commit "forthwith", without proof. On the other hand, where the refusal is not before a judge, there is no authorization for proceeding "forthwith", and proof by affidavit is necessary. The parallel to the Federal criminal contempt procedure is manifest. (Rule 42, Federal Rules of Criminal Procedure; see *Brown* v. *United States* [1959] — U. S. —, 3 L. Ed. 2d 609.)

The leading case interpreting the predecessor of Section 406 is *Matter of Barnes* (1912) 204 N. Y. 108. There, it was held in the prevailing opinion that due process of law required that the witness be not committed until after notice and a reasonable opportunity had been afforded to him to oppose the application and that an order committing a witness thereunder is a final adjudication for constitutional purposes, and not a mere interlocutory order. As Judge WERNER wrote (204 N. Y., at pages 124-125):

> "It has been suggested that the warrant provided for in section 856 is not the final adjudication inflicting punishment, but merely an intermediate writ under which the alleged offender is taken into custody until he 'submits to do the act which he was so required to do or until he is discharged according to law.' It would be difficult if not impossible to imagine any more summary or effectual method of depriving a person of his liberty than to take him into custody without notice, transport him to a common jail and keep him there until 'he submits to

do the act" which is required of him. It matters little by what name such a mode of procedure is known. It is a deprivation of liberty, and if it is not upon notice it is not due process of law. For these reasons I vote to construe section 856 as providing for notice, and so construed it is clearly constitutional . . ."

We recognize that in the recent dissenting opinion, in *Brown* v. *United States, supra,* it was stated (3 L. Ed. 2d, at page 619) that summary commitment until a witness answered questions was constitutionally valid. We respectfully submit that none of the cases cited for that proposition approves of summary commitment without adequate notice. The basis for that dictum is that such a witness "is said to carry the keys to the jail in his own pocket". This is inapplicable to the instant case, for here the same "key" which would free petitioner from State incarceration, would simultaneously gain entrance for him to the Federal penitentiary, as more fully pointed out in subdivision 2 above.

It is respectfully submitted that the proceedings had herein, prior to petitioner's commitment, deprived him of his liberty without due process of law, in violation of the Fourteenth Amendment to the United States Constitution. In the instant case, petitioner was not granted any reasonable time to oppose the application. His request for an adjournment to enable him to submit opposing affidavits was curtly denied (891). Within a matter of hours after he refused to testify, he was served with an order to show cause, appeared in Special Term, had his "hearing", and was incarcerated. Even the Appellate Division noted its disapproval of the procedure adopted and expressly criti-

cized the "precipitate haste with which the proceeding was conducted" (1030-2).

These proceedings did not involve simple cut-and-dried questions. A delicate and difficult problem of procedure was posed by the suggestion of this Court in *Knapp* v. *Schweitzer, supra,* 357 U. S. 371, 380, to the effect that the factual question of collaboration between State and Federal offices must be probed to determine its effect on a contention such as is now made. Certainly no reasonable opportunity to prepare for such a probing was afforded (compare *Chandler* v. *Fretag* [1954] 348 U. S. 3, 10; *Powell* v. *Alabama* [1932] 287 U. S. 45, 58-59); nor can we assume that if a fair opportunity to be heard and to prepare a defense had been afforded, no relevant evidence would have been produced (*Coe* v. *Armour Fertilizer Works* [1915] 237 U. S. 413, 424; *Cooke* v. *United States, supra,* 267 U .S. 517). In the *Cooke* case, even though the Court acknowledged that a clear contempt had been committed, it wrote that where said contempt was not committed in open court, charges and a reasonable opportunity to be heard are indispensable requisites (267 U. S. at pages 536-537):

> "When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument.
>
> • • •
>
> Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested,

and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. See Hollingsworth v. Duane, Wall Sr. 77, Fed. Cas. No. 6,616; Re Stewart, 118 La. 827, 43 So. 455; Re Clark, 208 Mo. 121.'

The same rule, of course, applies to proceedings in a State court (*Re Oliver, supra*, 333 U. S. 257, 273).

Accordingly, even if it should be held that petitioner improperly failed to answer legal and relevant questions, certiorari should be granted and the orders below reversed for failure to proceed in a manner consonant with due process of law.

4. The overall effects of the proceedings violate due process and constitute cruel and unusual punishment.

In addition to the specific violations of petitioner's constitutional rights dealt with above, we submit that his incarceration—permanent for all that appears—has been brought about by methods offensive to any "sense of justice" and, regardless of "theories", his "practical and substantial" rights have been destroyed (*Rochin* v. *California* [1952] 342 U. S. 165, 173, 174).

In sum, the petitioner, a private citizen, simultaneously being investigated for violations of Federal (637), as well as State (593-4) crimes, was subpoenaed before a State body which had virtually unlimited inquisitorial powers (L. 1958 Chapter 989, Section 2 [1]); see, also, *Watkins* v. *United States* (1957) 354 U. S. 178; *Sweezey* v. *New Hampshire* (1957) 354 U. S. 234, and which was under the command of the statute which created it to "cooperate" with

the Federal authorities (L. 1958 Chapter 989, Section 2 [5]) and was asked questions which, it is not denied, might incriminate him under both Federal and State laws. The State body quite obviously did not expect him to answer the questions, as is evidenced by the fact that mimeographed form papers had been prepared in advance for his incarceration (692-4). Within a few hours after his refusal to testify, proceedings were instituted at Special Term, and were completed with what the Appellate Division was compelled to acknowledge was "precipitate haste" (1032). As a result, he has been imprisoned, not for a limited period consonant with the gravity of the offense allegedly committed (compare New York Judiciary Law, §751; *Yates* v. *United States* [1958] 356 U. S. 363), but ostensibly for life, unless he elects to terminate his stay in prison by giving testimony which appears likely to subject him to Federal imprisonment.

In this connection we note that, far from carrying "the keys of his prison in his own pocket", the form of the order in the instant case directs petitioner to remain in jail until he shall "truthfully and responsively" answer specified questions (54). Obviously, the Commission has its own ideas of what is "truthful" and had such ideas even before the hearings started (136-8). In its interpretation that an answer *deemed by it to be false* will not free the petitioner, the Commisison has been sustained by the Supreme Court of the State of New York (in a companion proceeding, *Valenti* v. *McCloskey*, N.Y.L.J. March 30, 1959, page 11). This, we submit, amounts to keeping petitioner in jail until he gives an answer believed by his inquisitors to be true (*Ex Parte Hudgings* [1919] 249 U. S. 378, 382-384).

Furthermore, it is submitted that this is not a situation where incarceration is directed as a means of obtaining testimony. Incarceration itself was the objective—as is made clear by the Commission's Report, quoted in the footnote on page 10, *supra*, where it refers to the imprisonment of petitioner and others in like position as an "accomplishment". Had the objective been testimony no accomplishment would be claimed, for no testimony deemed credible by the Commission has been elicited from any witness.

The proceedings herein resulted in a denial of due process and constitute cruel and unusual punishment in violation of Amendments Fifth, Eighth and Fourteenth of the United States Constitution.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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April 1959

APPENDIX

Opinion in Appellate Division

Reported in
7 A. D. 2d 48; 180 N. Y. S. 2d 496.

BASTOW, J. We consider together appeals by seven respondents in separate proceedings seeking a review of orders made at Special Term. Procedural differences in disposing of the applications at Special Term require the preliminary statement that five respondents (Frank Valenti, Mancuso, Riccobono, Castellano and Miranda) appeal from orders made by SPECTOR, J., and two respondents (Lombardozzi and Peter Valenti) appeal from orders by TILZER, J.

In August, 1958 the appellants were served with subpoenas issued by the Commisison of Investigation of the State of New York commanding them to appear at a public hearing being conducted by the commisison in New York City. At the first hearing on August 12, 1958 the chairman announced that the hearing was being held in connection with what is now known as the Apalachin meeting in November, 1957, at the residence of one Joseph Barbara in Tioga County. The purposes of the hearing were stated to be, among other things, "Whether the crimes of conspiracy, violation of section 340 of the General Business Law which pertains to monopoly or restraint of trade statutes, and bribery of public officials or any other crimes were committed or planned at this meeting." There followed individual hearings for each of the appellants commencing on August 12 and ending on August 19. Each was represented

by one or more counsel at the hearings and in the subsequent court proceedings.

The pattern of the proceedings when each appellant appeared before the commission was much the same. Each was asked a series of questions numbering between 30 and 40. Responsive answers to these questions would have been relevant to one of the subjects of the investigation as stated in each subpoena to be "the organization, purposes and participants of, and discussions had and decisions made at" the Apalachin meeting. Other than identifying themselves, appellants refused to answer all questions. Such refusals were based on the privilege against self incrimination and other grounds, most of which are presented upon this appeal and will be hereinafter considered.

Following the respective refusals to answer questions, the members of the commisison purporting to act under statutory authority (L. 1958, ch. 989, § 7) voted to and did purport to confer immunity upon each appellant in accordance with section 2447 of the Penal Law. Each witness was then informed that he had immunity "from prosecution by the New York State authorities on account of any transaction, matter or thing of a criminal nature which may be revealed by your truthful and responsive answers to the particular questions which this Commission * * * may now direct you to answer." Thereafter, each appellant was asked some 26 questions which were among those previously propounded. Again each witness refused to answer the questions upon stated grounds. The direction was made that the questions be answered but each appellant persisted in his refusal.

We consider first the ensuing court proceedings relating to the five appellants who appeared before the commission on August 12, 13 and 15. As to each, individual orders were obtained directing the named witness to show cause, either forthwith or upon the same day that he had testified, why a warrant should not issue for his apprehension and commitment forthwith to jail there to remain until he answered the questions. The show cause order was supported by an affidavit of the commission chairman and a copy of the subpoena. Following a hearing in each case, and to which we shall advert subsequently, the applications were granted and warrants issued for the imprisonment of the five appellants until each answered the questions set forth in the warrant.

The other two appellants were brought before Special Term the day after the commission's hearing. In the interim, transcripts of the commission's hearing were forwarded to the court and counsel. Upon request of these appellants an adjournment of two days was granted. At that time appellants produced certain witnesses and while they complain of erroneous rulings in the course of the examination of these witnesses, it does not appear from either record or briefs that they attack the validity of the court hearings upon the ground that there was a summary determination without an adequate hearing. At the conclusion of this combined hearing the applications were granted and similar warrants issued for the imprisonment of the witnesses.

It is against this background that we consider the various contentions of the appellants. It is claimed that the act (L.

1958, ch. 989) creating the respondent commission is unconstitutional and in violation of the State constitutional provision (art. V, § 3). To place in focus this contention it is necessary to point out that section 2 of article V of the Constitution provides for 19 civil departments in the State Government. Section 3 then provides in part that "No new departments shall be created hereafter, but this shall not prevent the legislature frome creating temporary commissions for special purposes".

Turning to the enactment (L. 1958, ch. 989) under attack we find in section 1 the provision that "There is hereby created a temporary state commission of investigation." The four commissioners are to be appointed for a term of five years (§ 2) and the act is to remain in effect for five years (§ 13). Judged by any standards the commission is a temporary one and so at least one appellant concedes in his brief. It is unnecessary to recite in detail the functions, powers and duties set forth in the 11 subdivisions of section 2 of the act. We construe them as being "special purposes" within the meaning of the language set forth in the exception to the constitutional prohibition against the creating of new State civil departments.

One of the landmark decisions construing this constitutional provision is *Matter of People (Westchester Tit. & Trust Co.)* (268 N. Y. 432). There it was held that an act creating a Mortgage Commission and transferring to it the powers vested in the Superintendent of Insurance to control and administer mortgage investments of guarantee companies came within the plain intendment of the constitutional provision. The court placed emphasis upon the

abnormal if not emergency conditions that existed. The court stated (p. 443) that such conditions "call for prompt action and, in the opinion of the Legislature, no department is now equipped for such action. The Commission is created for the special purpose of prompt and effective action during the period when there is special need for prompt and effective action by a public agency properly equipped for that purpose."

In *Matter of Di Brizzi* (*Proskauer*) (303 N. Y. 206) the court passed upon the right of the Governor and Attorney-General to create by joint action a State Crime Commission under the provisions of subdivision 8 of section 63 of the Executive Law. In upholding the validity of the action it was said (p. 216) that "This is a *general* investigation into *organized* crime and its relation to government. As an incident thereto, it may be that the existence of specific, individual crimes will be uncovered, but that will merely be collateral and subordinate to the main object of inquiry. The purpose of the investigation is to secure information to guide executive action, not to indict or punish any individuals." The statute under consideration authorizes similar general investigations for the guidance of both the Executive and the Legislature. Pursuant to its legislative power (N. Y. Const., art. III, § 1) the Legislature was vested with power to enact the statute and we conclude that it was not violative of section 3 of article V.

The appellants make various attacks upon the inmunity conferred upon them by the commission. Section 7 of the enactment (L. 1958, ch. 989) provides in substance that in any investigation or hearing conducted by the commission,

relating to any crime with respect to which, by express statutory provision, a competent authority is authorized to confer immunity, such may be conferred by the commission in accordance with the provisions of section 2447 of the Penal Law, "but only after affording the attorney-general and the appropriate district attorney the opportunity to be heard in respect to any objections which they may have to the granting of such immunity." Without attempting to consider seriatim the contentions of the several appellants, we state our views that lead to the conclussion that immunity was properly conferred upon each appellant.

The commission, as has been noted, placed upon the record that it was investigating, among other things, whether the crimes of conspiracy or bribery of public officials had been committed. (Penal Law, §§ 378, 580.) By express statutory authority (Penal Law, §§ 381, 584) certain named officials and bodies are authorized to confer immunity in accordance with section 2447 of the Penal Law. The act under consideration extended this authority to the commission. At the hearings each appellant was carefully informed of such grant and the extent of the immunity flowing therefrom. This is found in subdivision 2 of section 2447 where it is stated that "immunity", as used therein, "means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding." The immunity so conferred was not limited to the crimes the commission had stated it was investigating. It was com-

plete immunity whether the answers given might involve the witness in the crimes of bribery or conspiracy or any other crime provided, of course, that the answers were truthful and responsive to the questions. Thus, appellants received immunity coextensive with their privilege against self incrimination. (N. Y. Const., art. I, § 6.)

Appellants further contend the proffered immunity was worthless since the facts were not disclosed regarding communications between commission, the Attorney-General of the State, and various District Attorneys. As indicated above, section 7 of the act creating the respondent (L. 1958, ch. 989) provides that its right to confer immunity is to be exercised only after affording the Attorney-General and the appropriate District Attorney the opportunity to be heard in respect of any objections which they may have to such grant of immunity. In passing it might be noted that a similar provision is found in section 2447 (subd. 3, par. [d]) of the Penal Law. This section was enacted as a result of recommendations filed by the New York State Crime Commission in 1953. (See Third Report of N. Y. State Crime Comm.; N. Y. Legis. Doc., 1953, No. 68, pp. 14-16.) After recommending therein that the power to grant immunity be given to a "competent authority" which was defined, among other things, as "a majority of a legislative • • • commission"; it was said (p. 16): "The legislation might also provide that any official or official group, other than a court, authorized to grant immunity, before so doing should as a matter of course consult with the appropriate district attorney."

When requested in these proceedings, the commission informed each appellant that it had afforded the Attorney-General and the appropriate District Attorney an opportunity to be heard in compliance with section 7, but refused to specify the details thereof. We find no error in that decision. The grant of immunity was absolute. It appears to have been the legislative intent that before such extensive power was exercised by the commission, as a matter of governmental comity, it should give certain public prosecutors an opportunity to be heard to enable them to induce the commission to withhold the granting of such immunity for reasons advanced, which might have been unknown or overlooked by the commission. But the opportunity to be heard was not a restriction on the power. If objections were made by prosecutors and not heeded by respondent, the witness would not be the less protected. Assuming the commission acted improvidently in the face of objections it might be subject to correction in an official forum or otherwise. Such eventual correction, regardless of what effect it might have on the commission, individually, or as a body, could not detract from the immunity already granted. Thus, in stating that the Attorney-General and appropriate District Attorney had been afforded an opportunity to be heard, the respondent sufficiently complied with the statute. It was not for appellants to go further into the matter. When the immunity is granted it is not at the peril of the witness but at the peril of the commission if it fails to comply with the requirements of the statute.

Lastly, upon this subject, the appellants claim that the immunity so conferred was invalid since it does not pro-

tect them from subsequent prosecutions by Federal authorities. This question has been recently passed upon by this court in *People* v. *Costello* (6 A D 2d 385) in the light of *Knapp* v. *Schweitzer* (357 U. S. 371). In the *Costello* case (p. 387) we said that "Although the potential exposure to Federal prosecution asserted by appellant seems reasonable enough, since the Federal Government might form an interest in the answers which he could give concerning the written notations on the paper found in his pocket, this exposure is not a ground for excusing the answers where the immunity which flows from State law is as adequate as the State can make it against its own subsequent prosecution. (*Dunham* v. *Ottinger*, 243 N. Y. 423.) This rule is not, of course, open to re-examination here. (Cf. dissenting opinions by BLACK and DOUGLAS, JJ., in *Knapp* v. *Schweitzer, supra*, p. 383.)"

The appellants, however, renew their claims as to the inadequacy of the conferred immunity upon the ground that one of the functions of the commission is to "cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state." (L. 1958, ch. 989, § 2, par. 5.) This does not alter our opinion as expressed in the *Costello* case (*supra*). As we understand the *Knapp* case (*supra*) the crucial holding was that the sole "purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth." (357 U. S. 371, 380.)

It has been heretofore found that the State conferred upon appellants complete immunity. It is unnecessary for this court to speculate as to what the effect of this might be in the event of subsequent Federal prosecution under circumstances here open only to conjecture. The test is whether the immunity gives protection against State prosecution—"all that the State is required to or can do is to give immunity against its own processes and, if it has done that, as this statute does it, it has satisfied the requirements of the Constitution." (*Dunham* v. *Ottinger*, 243 N. Y. 423, 438.)

In sum, every person owes a duty to the State to testify when called before a duly constituted authority. However, he may not be compelled to testify when he claims his privilege against self incrimination. But that privilege disappears when the State removes any danger of criminal prosecution—based on any testimony he may give—by granting immunity securing the witness against such prosecution. Hence, when immunity is properly tendered to a witness claiming his constitutional privilege, he must answer or suffer the consequences of his contumacy. The object of the constitutional privilege is fully accomplished when immunity is granted.

We recognize that in *Knapp* v. *Schweitzer* (*supra*) the court posed but left unanswered the question as to whether, in the case of collaboration between State and Federal officials, a defendant might successfully assert his privilege in the State proceeding. Moreover, it is suggested therein that evidence so obtained might be excluded in a Federal prosecution. This suggestion is re-enforced by

the views expressed by some of the Justices in separate opinions that the rule enunciated in *Feldman* v. *United States* (322 U. S. 487) should be reconsidered. All of this presents a wide area for judicial discussion. This court, however, in the absence of the expression of a contrary view by the Supreme Court, is bound by the rule of law enunciated in *Dunham* v. *Ottinger* (243 N. Y. 423, 438, *supra*). There, as heretofore stated, it was held that the State is only required to give immunity against its own processes and when that is done the constitutional requirements have been satisfied.

Finally, the appellants contend that the commission pursued the wrong remedy in bringing these proceedings pursuant to section 406 of the Civil Practice Act. Moreover, they claim that if the section is applicable the proceedings at Special Term were conducted in such a manner as to be violative of the due process clauses of the State and Federal Constitutions. The appellants argue that the witnesses, if they are in con mpt, may only be prosecuted in a criminal proceeding concerning such contempt (Judiciary Law, § 750). Section 406 provides, in substance, that when a witness, such as these appellants, attending before a body, such as respondent, "refuses without reasonable cause • • • to answer a legal and pertinent question • • • the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts, by warrant commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to

law." The destinction between this section and the provisions of the Judiciary Law (art. 19) is that the latter are punitive in nature whereas section 406 is coercive alone. (Cf. *Matter of Delehanty* [*Sullivan*], 202 Misc. 33, affd. 280 App. Div. 542, affd. 304 N. Y. 725.)

In *Matter of Barnes* (204 N. Y. 108) the court considered a like provision than found in section 856 of the Code of Civil Procedure. Judge GRAY wrote (p. 113) that "This statute is, and always has been, a valuable instrumentality in the administration of justice and the enforcement of laws." We find no authority that required the commission to proceed to invoke the punitive provisions of a criminal contempt as distinguished from its applications for coercive relief to compel the witnesses to testify.

A more troublesome question is presented as to whether appellants were accorded due process in connection with the court proceedings on August 12, 13 and 15. In *Matter of Barnes* (*supra*) one of the questions before the court was whether a summary conviction under the predecessor section violated a constitutional right. Some of the members of the court were of the opinion (1) that a summary conviction without notice violated no constitutional right and (2) that even if notice were necessary, the court could read into the section a provision requiring notice to be given. A majority of the court, however, while disagreeing with the first proposition held (p. 122) that the language of the section "may be so construed as to require notice to one charged with the contempt, and that when read in connection with the provisions of the Judiciary Law relating to criminal contempts, the question is removed from the realm of doubt."

In these proceedings there can be no question that notice was given in the form of show cause orders based upon an affidavit made by the chairman of the commission setting forth in some detail service of the subpoena and the ensuing proceedings before the commission. A transcript of the testimony in each proceeding was made available to the court and counsel for the witness. The disturbing feature of the proceeding is what took place in Special Term *in connection with five* of these appellants. As has been stated heretofore, these witnesses were brought before Special Term on the same day each had been called to testify. All requests for adjournments were denied. There was, however, a hearing and counsel for each appellant advanced in various ways many of the same contentions that are presented to this court and discussed herein. A careful reading of the record of the five proceedings discloses that, in substance, each counsel requested additional time to submit a brief or examine the law. Counsel was of the opinion that there were many intricate questions of law that should be explored. The court was of the opinion that the legal questions were simple and should be passed upon at once. We do not find any request for an adjournment to enable appellants to produce evidence either documentary or by witness. The precipitate haste with which the proceedings were conducted does not meet with our approval. However, the ultimate question is whether there was any prejudice to appellants amounting to a denial of due process because they were denied adjournments so their counsel could examine the law and submit briefs. After the passing of weeks we have examined the same questions, together with others advanced by appellants,

and determine that Special Term was correct in its legal decisions and in the action taken.

The contentions of the remaining two appellants that they were not accorded due process are without substance. As to them, adjournments were granted when counsel stated that they desired to submit proof. Subsequently, witnesses were called in an attempt to prove co-operation between State and Federal law enforcement agencies as *bearing upon the completeness of the granted immunity.* What has heretofore been written upon this subject makes it clear that such testimony was irrelevant and properly excluded. The same conclusion is reached as to the court's ruling excluding testimony relating to the notice given by the commission to other State prosecutors before conferring immunity.

It has been said that "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. * * * Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it." (*Dohany v. Rogers*, 281 U. S. 362, 369.) When the contentions of appellants are considered in the light of this legal principle it cannot be found that there was any denial of due process. They received reasonable notice. Some had been subpoenaed two weeks before the date of their appearance. Each was represented by counsel and after complete immunity had been granted each persisted in his refusal to testify.

Thereupon, they were brought before Special Term in proceedings instituted pursuant to section 406 of the Civil Practice Act. The burden then placed upon appellants to justify their refusal to answer the questions was the establishment by them of a sufficient cause for which a reason could be and was given. The reasons so advanced consisted of legal contentions that the creation of the commission was unconstitutional and that the immunity conferred was either defectively accomplished or not adequate to protect them from subsequent prosecution. After hearings Special Term found that no reasonable cause had been shown by appellants for their r. sals to answer the questions. The decisions were properly made pursuant to section 406 after hearings that met the requirements of due process.

The orders appealed from should be affirmed.

BREITEL, J. P., RABIN, M. M. FRANK and VALENTE, JJ., concur.

Orders unanimously affirmed.

Constitutional Provisions

A, AMENDMENT 5, UNITED STATES CONSTITUTION.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without first compensation."

B. AMENDMENT 8, UNITED STATES CONSTITUTION.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

C. AMENDMENT 14, UNITED STATES CONSTITUTION.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." * * *

Statutory Provisions

New York Civil Practice Act

"§406. Subpoena Issued by Judge, Arbitrator, Referee or Other Persons, in Certain Cases.

1. When a judge, or an arbitrator, referee or other person, or a board or committee, has been heretofore or is hereafter expressly authorized by law to hear, try or determine a matter, or to do any other act in an official capacity, in relation to which proof may be taken, or the attendance of a person as a witness may be required; or to require a person to attend, either before him or it, or before another judge, or officer, or a person designated in a commission issued by a court of another state or country, to give testimony, or to have his deposition taken, or to be examined; a subpoena may be issued by and under the hand of the judge, arbitrator, referee or other person, or the chairman or a majority of the board or committee, requiring the person to attend; and also, in a proper case, to bring with him a book or a paper. The subpoena must be served in the same manner as prescribed for a service of a subpoena issued out of a court of record. This section does not apply to a matter arising, or an act to be done, in an action in a court of record.

2. A person who is duly subpoenaed, as prescribed in the last subdivision, must obey the subpoena. If he fails so to do, without a reasonable excuse, he is liable, in addition to any other punishment which may be lawfully inflicted therefor, for the damages sustained by the person aggrieved, in consequence of the failure, and fifty dollars in addition thereto, to be recovered in the same manner as prescribed in the case of a person failing to obey a sub-

poena issued out of a court of record. If he fails to attend, the person issuing the subpoena, if he is a judge of a court of record or not of record, or if not, then any judge of such a court, upon proof by affidavit of the failure to attend, must issue a warrant to the sheriff of the county commanding him to apprehend the defaulting witness and bring him before the officer, person or body before whom or which his attendance was required.

3. If the person subpoenaed and attending or brought as prescribed in the last subdivision before an officer or other person or a body refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book or paper which he was directed to bring by the terms of the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts, by warrant commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law.

4. A warrant of commitment, issued as prescribed in the last subdivision, must specify particularly the cause of the commitment; and, if the witness is committed for refusing to answer a question, the question must be inserted in the warrant.

5. A warrant to apprehend or commit a person, issued as prescribed in this section, must be directed to the sheriff of the county where the person is, and must be executed by him in the same manner as a similar mandate issued by a court of record in an action."

New York Laws of 1958, Chapter 989

"Section 2. Functions, powers and duties of the commission. The commission shall have the following functions, powers and duties:

1. The commission shall have the duty and power to conduct investigations in connection with:

(a) The faithful execution and effective enforcement of the laws of the state, with particular reference but not limited to organized crime and racketeering;

(b) The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

(c) Any matter concerning the public peace, public safety and public justice.

• • •

5. The commission shall cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state.

• • •

7. Whenever it shall appear to the commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the commission shall refer the evidence of such crime or misconduct to the officials authorized to conduct the prosecution or to remove the public officer."

Appendix—Statutory Provisions

New York Penal Law

"SECTION 2447. WITNESSES' IMMUNITY.

"1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity; if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided herein.

2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order of competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subject to penalty or forfeiture for any perjury or contempt committed in answering or failing to answer or in producing or in failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt." • • •

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JUN 8 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1958

No. 893

MICHELE MIRANDA,

Petitioner,

—against—

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, BY MYLES J. LANE, CHAIRMAN, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A. SARACHAN, COMMISSIONERS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 893

MICHELE MIRANDA,

Petitioner,

—against—

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, BY MYLES J. LANE, CHAIRMAN, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A. SARACHAN, COMMISSIONERS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Preliminary Statement

A petition is here sought for a writ of certiorari to the New York Court of Appeals to review an order of that Court, entered March 13, 1959, which unanimously affirmed, without opinion, an order of the Appellate Division of the Supreme Court, First Department, entered on December 9, 1958 (967).* That Court in turn had unanimously affirmed, with an

* Numerals in parenthesis refer to folio numbers in the consolidated record on appeal.

opinion by Bastow, *J.* (985, *et seq.*; and see Petition, Appendix, page 22), an order of the Supreme Court of New York County, entered August 15, 1958 (529). The order granted an application by the Commission of Investigation of the State of New York for a warrant, pursuant to the authority of Section 406, New York Civil Practice Act, committing petitioner to jail for his absolute refusal to answer certain questions at a hearing of the Commission into the "Apalachin Meeting", which had been held in New York at Apalachin, Tioga County. On April 9, 1959, the Court of Appeals amended its remittitur upon petitioner's application so as to define the precise questions considered (Petition, page 2).

Six other recalcitrant witnesses were incarcerated under identical orders and warrants for their similar refusals to testify during the same hearing in August, 1958. In the New York courts the appeals of all seven were consolidated. Petitioner and all but one of the seven so committed are presently confined to the Civil Jail of New York County.

As of this date, Joseph Riccobono, one of the other six persons so incarcerated, separately has petitioned this Court for a writ of certiorari to the New York Court of Appeals for review of the affirmance of his order and warrant of commitment. A third, Paul Castellano, separately has filed both a notice of appeal and a petition for a writ of certiorari for review of the New York Court of Appeals' decision affirming his incarceration. An application by Castellano for bail pending appeal was denied by Mr. Justice Harlan on May 4, 1959.

The opinion of the Appellate Division on the consolidated appeal is reported as *Commission of Investigation* v. *Lombardozzi, et al.*, 7 A. D. 2d 48, 180 N. Y. S. 2d 496 (1st Dept. 1958), *aff'd without opinion*, 5 N. Y. 2d 1026 (1959).

The Commission:

The Commission of Investigation was established by Chapter 989 of the 1958 Laws of the State of New York, Section 7051, *et seq.*, of the Unconsolidated Laws. Recommendations filed by the New York Crime Commission in 1953 were closely followed by the Legislature in creating this Commission.

> "The Commission recommends, as such a step, the creation in the Executive Department of a permanent commission, possibly to be called the Commission of Investigation, which would have as its continuing function the investigation of the relationship between crime and government, and any other matters pertaining to the administration of the criminal laws, and to hold private and public hearings with respect to these matters and make reports and recommendations to the Governor.
>
> "This is not a novel recommendation. One of the model statutes suggested by the Drafting Committee of the Council of State Governments would create an agency 'to make analyses of local problems of organized crime and the efficiency of law enforcement facilities.' The American Bar Association has made a similar recommendation." *First Report of the New York State Crime Commission, Leg. Doc. No. 23 (1953), pp. 27-30.*

Chapter 989 directs the Commission to conduct investigations, *inter alia*, in connection with:

> "Section 2(1)(a) The faithful execution and effective enforcement of the laws of the state, *with particular reference but not limited to organized crime and racketeering;*
>
> (b) The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;
>
> (c) Any matter concerning the public peace, public safety and public justice." (Italics added.)

The Constitutional Provisions and Statutes Involved

The pertinent constitutional provisions and statutes are set forth in the Appendix to the Petition at page 37, *et seq.*

The Facts

The Apalachin Meeting.

On November 14, 1957 the New York State Police reported stopping and questioning at the rural premises of Joseph Barbara in Apalachin, Tioga County, New York, a large number of persons who resided in various sections of this country and abroad. Petitioner and the six persons similarly incarcerated are New York residents and were among this group.

Over 62 persons have been identified publicly as attending the meeting, which has come to be referred

to as the "Apalachin Meeting." Almost all of the participants have extensive records of criminal activity. Many are reputed to be influential in illicit activites of one kind or another. Obviously the circumstances under which these individuals were found—the simultaneous attendance of this particular, large and diverse group in a remote location—indicates extensive planning and unity of purpose. And as might be expected, the meeting has attracted extraordinary public attention in the State of New York as the meeting was within its borders and more than 35 of those present were residents of New York.

The Commission's Hearings.

Shortly after its organization the Commission initiated an inquiry into the Apalachin Meeting. Public hearings for these purposes commenced in the Criminal Courts Building, New York County, on August 12, 1958 (130, *et seq.*). The subpoenas by which petitioner and all other witnesses at those hearings were directed to appear before the Commission contained the statement they were being called to testify concerning:

> "* * * the public peace, public safety and public justice, and the faithful execution and effective enforcement of the laws of the State of New York, with particular reference but not limited to organized crime and racketeering, *including the organization, purposes and participants of, and discussions had and decisions made at, a meeting held on the premises of Joseph Barbara on or about November 14, 1957; at Apalachin, Tioga County, State of New York.*" (e.g. 96) (Italics added.)

At the outset of the hearings the Chairman of the Commission read an opening statement to the assembled witnesses and their counsel which set forth the purposes of the hearing in considerable detail (133, *et seq.*). It was repeated and referred to on various occasions to individual witnesses including petitioner (191, 282, 383, 479, 588). The statement read, in part, as follows:

> *"In our investigation and through this hearing we aim to ascertain who organized the Apalachin meeting on November 13th and 14th, 1957, the persons who attended, the purpose or purposes, what occurred, what actions were taken and what decisions were made.*
>
> "We intend to find out whether the crimes of conspiracy, violation of Section 340 of the General Business Law, which pertains to monopoly or restraint of trade statutes, bribery of public officials or any other crimes, were committed or planned at this meeting.
>
> "Moreover, it is our purpose to determine if changes in the law are necessary and, if so, to recommend such measures to the legislature." (Italics added.)

As part of his opening statement the Chairman introduced a copy of the Commission's resolution authorizing these public hearings. The resolution, marked as Commission's Exhibit 1, again set forth the purpose and subject matter of the investigation (597).

The Commission's inquiry into the Apalachin Meeting is continuing within this framework.

Petitioner's Conduct Before the Commission.

An individual hearing was held for petitioner before the Commission. A similar pattern of events occurred regarding petitioner and the others during their respective hearings. Each was represented by one or more counsel throughout the Commission and subsequent court proceedings (e.g., 596; 889).

Questions were directed to petitioner by the Commission concerning "the organization, purposes and participants of, and discussions had and decisions made at" the Apalachin Meeting (600-663). Other than merely identifying himself (601), petitioner refused to answer these questions (602). His refusals were based on his privilege against self-incrimination and numerous other alleged general and technical grounds.

In every instance the Commission, acting under the authority of Section 7 of its Act and in accordance with Section 2447 of the New York Penal Law, thereupon voted to confer and did confer immunity upon petitioner and the others. The Commission's action and the effect of its decision regarding immunity were clearly explained to petitioner, as well as various consequences which might follow if he refused thereafter to respond candidly and truthfully to the questions to be put to him by the Commission (619, *et seq.*).

After this instruction the same questions were repeated by the Commission. As did the others, petitioner again refused to make any answer on the basis of several alleged grounds, including the privilege against self-incrimination contained in both the New York and United States Constitutions (635).

On behalf of the Commission the Chairman then specifically directed and ordered petitioner to answer the questions as they were put to him (638, *et seq.*) Petitioner nevertheless persisted in his refusal to answer (639, *et seq.*).

After petitioner had followed the aforementioned pattern for some 26 questions directed toward his presence at the Apalachin Meeting, and it was clear he intended to answer no further questions, his hearing was adjourned by the Commission pending further proceedings (663).

The Hearings in the Trial Court.

After petitioner's separate hearing was adjourned by the Commission, pending further proceedings, an order was obtained and served personally on petitioner directing him to appear before Special Term of the Supreme Court, New York County, to show cause why a warrant of commitment should not issue against him pursuant to Section 406, Civil Practice Act, for his refusal to answer the Commission's questions.

Petitioner was the fifth recalcitrant witness to be committed after a full hearing at Special Term. Two were committed August 12, and two on August 13. Petitioner was committed on August 15. Each witness who proceeded petitioner had raised the same legal objections that petitioner now raises, and the same judge who committed petitioner had heard and passed upon those arguments (682, *et seq.*, 751, *et seq.*, 793, *et seq.*, 847, *et seq.*). In fact Castellano, one of the four committed before petitioner, was then repre-

sented by petitioner's attorney who made extensive legal argument on the merits of Castellano's commitment (847-885). Before petitioner's judicial hearing the minutes of the Commission hearing had been transcribed and made available to both the Court and counsel. The Court stated its findings were based on a study of the transcript. After opportunity for full argument, which petitioner's attorney did not utilize, the Commission's application was granted by the Court and the warrants executed.

Since his commitment, petitioner has been confined continuously to the Civil Jail of New York County under the custody of the Sheriff of the City of New York.

At no time, before or during the hearings of the Commission and the Court or to the present, has petitioner given any indication of a desire to answer the Commission's questions. Upon truthfully and responsively answering the questions put to him petitioner may secure his release pursuant to law (e.g., 529 [order], and 115 [warrant]).

Questions Presented

Does the duty of a state law enforcement agency to apprise federal law enforcement authorities of such violations of federal law as it discovers in the course of its investigations thereby convert the privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution, a prohibition against action by the national government only, into a prohibition against action by the state

government after immunity has been conferred by the state upon petitioner?

Was the state trial court's refusal to grant petitioner's request for a hearing adjournment such an abuse of its discretion as to deprive petitioner of the due process protections guaranteed by the Fourteenth Amendment to the United States Constitution, where petitioner was offered full opportunity to present argument but chose to waive such opportunity and appear specially, and the state courts have unanimously upheld the manner by which the trial court acted in accordance with the state civil procedure?

* * * *

Petitioner here raises an alleged third issue that "the over-all effects of the proceedings violate due process and constitute cruel and unusual punishment" (Petition, page 19). The Commission is uncertain as to the legal theory so advanced, or the seriousness with which, it is urged, for among other reasons no witness before the Commission since its inception—including petitioner—has complained of the procedure by which the Commission conducted its hearings. Accordingly, no response is made to this specious "question". At best it is no more than a combination of arguments already offered respecting petitioner's federal privilege against self-incrimination and his rejected request for an adjournment—plus some window dressing. In any event petitioner has failed to indicate how this issue was timely raised in the state courts, particularly since it was in no way raised in the trial court or on the first appeal in the New York courts.

ARGUMENT

POINT I

Petitioner's rights under the Fifth Amendment to the United States Constitution were not infringed and cannot be prejudiced by the state proceedings.

Petitioner's rights against compulsory self-incrimination under the Fifth Amendment to the United States Constitution could not have been infringed during the Commission hearings. The Fifth Amendment is a prohibition against the national government only and is inapplicable to the states or state proceedings. *Knapp* v. *Schweitzer*, 357 U. S. 371 (1958); *Adamson* v. *California*, 332 U. S. 46 (1947); *Twining* v. *New Jersey*, 211 U. S. 78 (1908); *Jack* v. *Kansas*, 199 U. S. 372 (1905); *accord*, *Barron* v. *Baltimore*, 32 U. S. (7 Pet.) 243 (1833). Also, neither the due process clause nor the privileges or immunities clause of the Fourteenth Amendment incorporaties the Fifth Amendment privilege against compulsory self-incrimination so as to make that privilege available during state proceedings. *Twining* v. *New Jersey*, *supra*; *accord*, *Knapp* v. *Schweitzer*, *supra*.

A witness in a New York proceeding has the right to claim his privilege against self-incrimination under the New York Constitution, Article I, Section 6, if he so elects, as did petitioner in this instance. But the conferral of immunity by the State of New York gave protection to petitioner co-extensive with the sole privilege it granted; under such circumstances testimony may be coerced from petitioner by incarceration, and particularly where an official state investi-

gation is directed toward uncovering an event that took place within the borders of New York and petitioner is a New York resident. This is especially true of cases in which a witness has refused absolutely to testify as directed by lawful authority, as petitioner so refused. In such event, New York has done all it can do and, more important, all it has to do through conferring valid immunity under New York law. *Knapp* v. *Schweitzer,* 357 U. S. 371 (1958); *Jack* v. *Kansas,* 199 U. S. 372 (1905). To hold otherwise would, in effect, foreclose any state from ever conferring immunity.

The New York Courts have unanimously sustained the grant of immunity proffered petitioner pursuant to New York law, *Commission of Investigation* v. *Lombardozzi, et al.,* 7 A. D. 2d 48, 180 N. Y. S. 2d 496 (1st Dept., 1958), *aff'd without opinion* 5 N. Y. 2d 1026 (1959) (this proceeding); *Dunham* v. *Ottinger,* 243 N. Y. 423, 154 N. E. 298 (1926), and petitioner appears to concede the validity in New York of the grant of immunity.

On the same rationale the converse has been established: Only the federal privilege against compulsory self-incrimination is available to a witness during federal proceedings. Once immunity co-extensive with that federal privilege is offered, such witness' testimony may be coerced under penalty of incarceration, notwithstanding resultant exposure to subsequent state prosecution. *United States* v. *Murdock,* 284 U. S. 141 (1931); *Hale* v. *Henkel,* 201 U. S. 43 (1906); *Brown* v. *Walker,* 161 U. S. 591 (1896).

Petitioner claims, however, that these fundamental decisions are irrelevant as there are "unique factors"

in this case which make those decisions inapplicable. This is hardly so, as an examination of the "unique factors" quickly reveals:

1. Petitioner claims that Section 2(5) of the Act establishing the Commission requires the Commission to conduct investigations whose principal purpose is to uncover federal crimes. Section 2(5) reads as follows, in its entirety:

> "The commission shall cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state."

Fairly read, the section merely requires the Commission to turn over to federal authorities evidence of federal crimes which is discovered incidentally during the course of the Commission's investigations into state matters.

In fact, were Section 2(5) construed as petitioner contends it would be unconstitutional as an improper intrusion of the state into federal affairs. *Accord, Pennsylvania* v. *Nelson,* 350 U. S. 497 (1956); United States Constitution, Amend. X. Hence if there is any ambiguity as to the meaning of this section of a New York statute, and the Commission contends there is none, its interpretation is controlled by the settled doctrine that "where an act is susceptible to two constructions, one of which will make it constitutional and the other unconstitutional, the former will be adopted." I McKinney's Statutes, Section 150 (1942). Furthermore, even assuming petitioner to be correct that Section 2(5) gives the Commission authority to investigate federal crimes as a principal

purpose, the mere existence of such a power is irrelevant to petitioner's case, since there has been not the slightest factual showing that such power was in fact used.

2. Petitioner claims there are vast and somber consequences that must flow from the Commission's statutory duty under Section 2(5) to cooperate with federal prosecuting authorities. The Commission's statutory duty so to cooperate is merely a codification of a duty already incumbent upon every state official by virtue of his oath of office, which includes his pledge to support and defend the Constitution of the United States as well as his state constitution. The duty to cooperate with federal officers was at least implicit in every "two sovereignty" case decided by this Court—and that duty was in each case considered of no consequence.

Petitioner's reliance upon *Knapp* v. *Schweitzer*, 357 U. S. 371 (1958), in an effort to bolster his objection to federal-state cooperation, is misplaced. The most petitioner may make of *Knapp* is that the opinion leaves unconsidered the question of whether the use of a state by federal authorities as "an instrumentality of federal prosecution or investigation" (at p. 380) would make the federal privilege applicable to state proceedings. Only a moment's pause is necessary to conclude that "instrumentality" and "cooperation" are vastly different concepts. "Instrumentality" envisions the extreme situation where the state is a mere pawn of federal authorities, and the state proceeding a sham. There has been no showing by petitioner to demonstrate the existence of such a situation nor could there be such a showing. Pages

13 and 14 of his petition, wherein he infers the existence of an "instrumentality" from the "facts" he alleges, is a classical illustration of the *non-sequitur*. The record contains no such facts. Cooperation more significant than the mere language of Section 2(5) of the Commission's act was shown to exist in *Knapp*, and was considered irrelevant. The *Knapp* case suggests a sensible approach to the "instrumentality" problem in the federal context: evidence secured by use of the state as an "instrumentality" will be inadmissible in the federal courts; rather than foreclose the state from acting in the all important exercise of its police powers against a serious problem of law enforcement in the first instance.

3. Petitioner claims the Commission's investigation has placed him in danger of federal prosecution. All that has been said about cooperation is applicable to this "unique factor," since the danger of federal prosecution for reasons unrelated to state action is something less than cooperation. A real danger of prosecution by a second sovereign was implicit in both *Knapp* v. *Schweitzer*, 357 U. S. 371 (1958) and *United States* v. *Murdock*, 284 U. S. 141 (1931), and both considered this factor inconsequential.

Petitioner's real aim is a reversal of *Knapp* v. *Schweitzer, supra*, and the decisions leading up to it. His "unique factors" provide no basis for doing so; indeed their examination illustrates the soundness of *Knapp* and how completely it disposes of petitioner's claims.

POINT II

Petitioner was accorded full due process protection during this proceeding.

The basic requirements of procedural due process are the establishment of jurisdiction and the provision of notice and hearing, *Twining* v. *New Jersey*, 211 U. S. 78 (1908). The only due process question raised by petitioner in this case, is whether the hearing requirement was adequately satisfied. Section 406, he concedes, provides for a hearing. *Matter of Barnes*, 204 N. Y. 108, 97 N. E. 508 (1912). But petitioner complains that the trial court's denial of his request for an adjournment of the hearing which resulted in his incarceration was an abuse of discretion and thereby denied him a fair hearing; this deprivation was so serious, he continues, as to require what amounts to supervisory action by this Court concerning a minute point of state civil procedure already decided adversely to him by several unanimous state courts.

The Commission is confident that a detailed examination of the record will reveal clearly that petitioner had full due process protection throughout this proceeding and that this issue is of such a nature as not to call for action by this Court.

1. Petitioner was fully apprised of the exact subject matter of the investigation by the subpoena served upon him well in advance of the hearing, by the opening statement of the chairman, and by the Commission's resolution authorizing public hearings.

2. Petitioner came to the Commission hearings prepared not to answer any questions put to him concerning the Apalachin meeting. He was accompanied by counsel and fortified with various typewritten sheets containing alternative responses to be given to such inquiries as the Commission might direct to him. The responses set forth detailed and complex legal grounds for refusing to answer and clearly were written by counsel. These prepared answers included an alternative response in the event the Commission conferred immunity upon petitioner—which occurred. No claim of surprise at the Commission's conferral of immunity was made at any time nor in view of the advance preparation could such a claim have been made. The pattern of petitioner's deliberate conduct was set before the hearing even opened.

3. No objection has ever been made by appellant that the questions asked at the hearing were not legal and pertinent.

4. Petitioner was fully apprised, well in advance of his commitment, of all the legal consequences which might follow from the contumacious course of conduct he adopted, including possible commitment under Section 406. Two similarly contumacious witnesses were ordered incarcerated under Section 406 on August 12, 1958; two others on August 13, 1958 (one of whom was represented by petitioner's counsel). Petitioner's counsel was present and observed all proceedings before the Commission and the committing Court on August 12 and 13, and personally argued a bail application to an Appellate Court on these same issues for Castellano on August 14, 1958.

It was not until the next day, August 15th that petitioner had his hearing at Special Term and was ordered incarcerated.

5. The transcript of the proceedings in the trial court discloses that petitioner chose to appear specially, thereby waiving his right to introduce evidence or make legal argument on the merits. Even after counsel's decision to appear specially, the court extended opportunity to introduce evidence and make argument:

> "The Court: Counsel, do you want to make some statement for the record?
>
> "Mr. Brodsky: No, your Honor. Inasmuch as I have appeared specially, I refuse to make any statements." (894).

No specific challenge to the court's jurisdiction was disclosed at that time nor has any been forthcoming since.

6. The Court was well acquainted with the law of petitioner's case, having heard the legal issues argued four times previously. The issues of law raised were simple and readily resolved. That these issues were so resolved, is hardly a deprivation of due process. *Fisher* v. *Pace*, 336 U. S. 155 (1949).

7. The Court stated at appellant's hearing that it had studied the full transcript of the proceedings before the Commission, which was then before the Court. The Court's findings under Section 406 were based on that study. Petitioner raised no material or conflicting issues of *fact*, and for this reason alone his claim of deprivation of due process has no sub-

stance. The short of the matter is that petitioner has no factual "defense" at all, for his case involved only the legal interpretation of extremely simple facts: were you sworn and questioned; did you refuse to answer—all of which were made clear by the transcript.

Moreover, petitioner needed no further time to discover that he had just flatly refused to give any answers to questions about an event of which he has admitted knowledge.

Under these circumstances the courts of New York were correct in finding that the trial court had not so abused its discretion in denying an adjournment as to amount to a deprivation of due process of law. And, too, the decision to grant or deny an adjournment depends upon many variable factors within the peculiar administrative discretion of the trial judge, including the difficulty or simplicity of resolving the issues presented; his assessment of the adequacy of counsel's preparation; his assessment of the usefulness or futility of new research, legal memoranda and further argument, and so on.

Whether the refused adjournment, in the particular case, was an abuse of discretion is not a question of wide applicability but is limited to the facts of this particular case. The courts of New York have unanimously determined there was no abuse of discretion in this instance. No citations are necessary to indicate the settled policy of this Court not to disturb such state determinations as to state procedure, where the issue is of [illegible] limited applicability and almost certainly is confined to unusual circumstances present in the particular case.

CONCLUSION

The petition for a writ of certiorari to the New York Court of Appeals should be denied in all respects.

Respectfully submitted,

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IN THE

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

1. Respondent states (Br., p. 10) that petitioner did not raise in the lower New York courts the contention that the over-all effects of the proceedings in the New York State Supreme Court violated the Fifth, Eighth and Fourteenth Amendments, United States Constitution. This question was presented by petitioner in the New York Court of Appeals, and passed on by that court, as clearly appears from its order amending its remittitur. Accordingly, this court may consider it. (*Whitfield* v. *Ohio* [1936] 297 U. S. 431,

435-436; *Home Insurance Co.* v. *Dick* [1930] 281 U. S. 397, 407; *Sully* v. *American National Bank* [1900] 178 U. S. 289, 298.)

2. Respondent also states (Br., p. 10) that petitioner never complained of the procedure by which the respondent *Commisison* conducted its hearings. This is true. Petitioner's complaint is of the action of the State *court* in granting an order incarcerating petitioner, and the precipitate manner in which the order was granted on respondent's request.

3. Respondent argues (Br., p. 12) that if petitioner's position is sustained, the states would, in effect, be foreclosed from ever conferring immunity, since New York has done all that it can in conferring valid immunity under New York law. This is inaccurate. Our argument is limited to cases (a) where the State body granting immunity is mandated by statute to investigate federal crimes; (b) where the witness is in actual, demonstrable danger of federal prosecution for the acts concerning which the State body is conducting its inquiry; and (c) where a federal official is present at the State inquiry. All these factors are present here. None of them was present in *Knapp* v. *Schweitzer* (1958) 357 U. S. 371, or in *Mills* v. *Louisiana* (Nos. 74, 75, Oct. Term 1958) —— U. S. ——, decided June 8, 1959.

4. Respondent would have it appear (Br., p. 13) that Section 2, Subdivision 5, of the Act establishing the Commission (N. Y. Laws 1958, Ch. 989), in requiring cooperation with federal authorities, merely means that the Commission shall turn over to such federal authorities evidence

of federal crimes discovered "incidentally during the course of the Commission's investigation into state matters." Respondent neglects to mention that Section 2, Subdivision 7, of that statute establishes a mandatory duty upon the Commission not only to "cooperate" with the federal authorities, but to "refer the evidence of such [federal] crime or misconduct to the officials authorized to conduct the prosecution." In other words, the respondent's position is that Section 2, Subdivision 5, merely *means* what Section 2, Subdivision 7, *says*. If that were so, there would be no necessity for enacting Section 2, Subdivision 7.

This is not a question of comity, but one of mandatory duty—a far different thing.

The foregoing fact would appear to be an answer to the respondent's contention (Br., p. 14) that the oath of office of the Commissioners to support and defend the federal Constitution necessarily implies "cooperation" with federal officers. The statutory mandate here goes far beyond the well understood concept of "cooperation," which may be held to be in the State officer's discretion. We submit that this unique type of statute should be held to constitute the State body an "instrumentality" of the federal government. In such event, a claim under the Fifth Amendment may properly be raised before the *State* body.

5. Respondent complains (Br., pp. 14-15) that the record contains no facts showing that the State body was being used as a federal "instrumentality". We submit that the facts in the record, summarized at pages 13 and 14 of the petition herein, adequately demonstrate such a conclusion. If there is any deficiency in the record, it is attributable to the precipitate haste with which the proceedings in the

State court of first instance were conducted, and to the denial of petitioner's request for an opportunity to submit answering affidavits (891).

6. Respondent states (Br., p. 15) that "A real danger of prosecution by a second sovereign was implicit in both *Knapp* v. *Schweitzer*, 357 U. S. 371 (1958) and *U. S.* v. *Murdock*, 284 U. S. 141 (1931), and both considered this factor inconsequential." We submit that this is not an accurate interpretation of the two cases. In *Knapp* v. *Schweitzer*, *supra*, 357 U. S. 371, 380, Mr. Justice FRANKFURTER said that "petitioner's assertion that a federal prosecuting attorney announced his intention of cooperating with state officials in the prosecution of cases in a general field of criminal law presents a situation devoid of legal significance as a joint state and federal endeavor." * In *U. S.* v. *Murdock*, *supra*, 284 U. S. 141, the

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* A complete refutation of the respondent's contention that the *Knapp* case involved a "real danger of prosecution by a second sovereign" (Br., p. 15) is found in the fact that the District Attorney's brief in that case went to great lengths to develop the fact that there was no evidence of any substantial danger of federal prosecution in that case (District Attorney's brief, *Knapp* v. *Schweitzer*, in this Court, pages 9-10, 11, 17, 18):

> "Although there may be cases in which real and impending cross-jurisdictional danger might be shown, no such situation here obtains" (pp. 9-10).
>
> * * *
>
> "Thus, completely protected in New York, the witness faces only the bare possibility of jeopardy in some other jurisdiction" (p. 11).
>
> * * *
>
> "It is conceivable that a case of substantial danger might arise by virtue of certain extraordinary circumstances, such as the pendency or actual commencement of a foreign criminal proceeding against a person, based upon the very matters about which a grand jury or other agency is contemporaneously interrogating him.

Court said, at page 149, "Nothing of state concern was involved."

In sharp contrast with the cited cases is the situation in the instant case. Not only does the record show that petitioner was in real and imminent danger of federal prosecution, but *such federal prosecution has actually eventuated and he has been indicted in the United States District Court for the Southern District of New York.* A copy of such indictment, of which this Court may take judicial notice (*Brown* v. *Board of Education* [1952] 344 U. S. 1, 3; *Wells* v. *U. S.* [1943] 318 U. S. 257, 260), is appended hereto. It will be noted that petitioner was indicted for an alleged conspiracy to obstruct federal justice by preventing federal authorities from investigating the same meeting which the State Commisison was investigating, and that overt acts alleged in the indictment include false statements by petitioner and others to State authorities. (See p. 16, *infra.*)

Yet respondent speaks (Br., p. 15) of "the danger of prosecution for reasons unrelated to state action"!

7. Respondent says (Br., p. 16) that the basic requirements of procedural due process are jurisdiction, notice and hearing. Included in the concept of notice and hearing is "a reasonable opportunity to meet" the charges. (*Cooke* v. *United States* [1925] 267 U. S. 517, 537.) That oppor-

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Here, however, nothing of this nature appears, * * *" (p. 17).

* * *

"It seems clear that the petitioner, unable to show any real danger of federal prosecution, has erected a phantom peril in the form of the aforementioned general 'policy'. The fears expressed by the petitioner on this score seem conveniently assumed, highly illusory and, indeed, purely in the nature of an afterthought" (p. 18).

tunity was denied to petitioner herein. Petitioner's complaint is not of "a minute point of state civil procedure", as respondent claims (Br., p. 16), but of an essential element of due process.

8. Respondent states (Br., p. 18) that petitioner chose to appear specially in the state court and thereby waived his right to introduce evidence. The record, on the contrary, shows that petitioner's counsel appeared specially solely to protest the short notice and specifically requested an opportunity to submit answering affidavits. He said (890-1):

> "I am appearing specially, if your Honor please, and I want to ask for an adjournment upon the ground that this order to show cause was served upon the respondent at two o'clock at 100 Centre Street. It was made returnable forthwith.
>
> It is now 2:38, and I have not had the opportunity, if your Honor please, for the purpose of making a complete record, of submitting answering affidavits in opposition thereto, and, therefore, I respectfully ask for an adjournment, a reasonable adjournment, so that I may be afforded the opportunity to do so."

9. Respondent contends (Br., p. 18) that the issues of law involved herein are "simple and readily resolved." The complexity of such issues is indicated by the fact that the Appellate Division took two months to decide the case (985, 967), wrote a lengthy opinion, and then certified that there were questions of law involved which should be reviewed by the Court of Appeals (983).

10. Respondent argues (Br., p. 18) that petitioner was not denied due process because he raised no material issues

of fact. Petitioner's claim is that he was deprived of due process because he was denied an opportunity to raise such issues by answering affidavits.

11. Respondent states (Br., p. 19) that the only issues under New York Civil Practice Act, Section 406, Subdivision 13, are whether the witness was sworn and asked certain questions, and whether he refused to answer. Respondent overlooks the fact that under that statute a stated prerequisite to judicial action is that the refusal to answer be "without reasonable cause" (see text of statute reprinted at page 39 of the petition herein). Petitioner contends that the claimed violation of his constitutional rights gave him reasonable cause not to answer.

12. Finally, respondent argues (Br., p. 19) that the procedural issue herein "is of very limited applicability". Yet, in its "First Report to the New York Governor and Legislature," quoted in the footnote on page 10 of the petition herein, respondent stated that "the importance of the decisions [of the New York Courts herein] cannot be emphasized too strongly," and that by its proceedings respondent "has accomplished much in establishing a new and aggressive approach with respect to underworld characters who refuse to give testimony." It is true that this approach is aggressive and new, but its propriety is a matter of first importance which should be passed upon by this Court.

CONCLUSION

The petition for certiorari should be granted.

ABRAHAM H. BRODSKY
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Attorneys for Petitioner

HARRIS B. STEINBERG
LEO H. HIRSCH, JR.
of Counsel

June, 1959.

INDICTMENT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JOSEPH BONNANO
RUSSELL A. BUFALINO
IGNATIUS CANNONE
PAUL C. CASTELLANO
JOSEPH F. CIVELLO
FRANK CUCCHIARA
JOHN A. DEMARCO
FRANK A. DESIMONE
NATALE EVOLA
SALVATORE FALCONE
JOSEPH IDA
JAMES V. LA DUCA
LOUIS A. LARASSO
CARMINE LOMBARDOZZI
ANTONIO MAGADDINO
JOSEPH MAGLIOCCO
FRANK T. MAJURI
MICHELE MIRANDA
JOHN C. MONTANA
JOHN ORMENTO
JAMES OSTICCO
JOSEPH PROFACI
ANTHONY P. RIELA
JOHN T. SCALISH
ANGELO J. SCIANDRA
SIMONE SCOZZARI
PASQUALE TURRIGIANO,

Defendants

INDICTMENT

**Title 18,
United States Code,
Sections 371, 1621**

Indictment

The Grand Jury Charges:

1. That commencing on or about the 14th day of November 1957, and continuously thereafter up until the date of filing this indictment, at the Southern District of New York, JOSEPH BONANNO, RUSSELL A. BUFALINO, IGNATIUS CANNONE, PAUL C. CASTELLANO, JOSEPH F. CIVELLO, FRANK CUCCHIARA, JOHN A. DEMARCO, FRANK A. DESIMONE, NATALE EVOLA, SALVATORE FALCONE, JOSEPH IDA, JAMES V. LA DUCA, LOUIS A. LARASSO, CARMINE LOMBARDOZZI, ANTONIO MAGADDINO, JOSEPH MAGLIOCCO, FRANK T. MAJURI, MICHELE MIRANDA, JOHN C. MONTANA, JOHN ORMENTO, JAMES OSTICCO, JOSEPH PROFACI, ANTHONY P. RIELA, JOHN T. SCALISH, ANGELO J. SCIANDRA, SIMONE SCOZZARI, PASQUALE TURRIGIANO, defendants herein, and Dominic J. Alaimo, Joseph Barbara, Jr., Joseph Barbara, Sr., Giovanni Bonventre, Roy Carlisi, Gerardo V. Catena, Charles Chiri, Nicholas Civella, James Colletti, Dominick D'Agostino, Joseph Falcone, Joseph Filardo, Carlo Gambino, Michael J. Genovese, Vito Genovese, Anthony F. Guarnieri, Bartolo Guccia, Sam Lagattuta, John S. Larocca, Russell V. Mancuso, Gabriel Mannarino, Patsy Monachino, Sam Monachino, Dominick Oliveto, Vincent Rao, Armand T. Rava, Joseph Riccobono, Joseph Rosato, Paul Scarcelli, Patsy Sciortino, Salvatore Tornabe, Santo Trafficante, Jr., Frank J. Valenti, Stanley P. Valenti, Emanuel Zicari and Frank Zito, co-conspirators not defendants herein, did unlawfully, willfully, and knowingly combine, conspire, confederate and agree together, and with each other and with others to the said Grand Jury unknown, to defraud the United States and to commit offenses against the United

States, to wit: to violate Title 18, Sections 1503 and 1621, United States Code.

2. That, further, as the said defendants and their co-conspirators well knew, a special investigation had been commenced by a United States Grand Jury in March of 1956 in the United States District Court for the Southern District of New York into racketeering and criminal syndicates with particular emphasis upon their activities in the ladies' garment and ladies' garment-trucking industry, labor management field, and the narcotics traffic, and has continued before Federal Grand Juries up until the date of the filing of this indictment.

3. During the course of said conspiracy, as the said defendants and their co-conspirators well knew, a meeting of individuals, some of whom were involved in the aforesaid special investigation, was held at the home of Joseph Barbara, Sr., a co-conspirator herein, in Apalachin, New York, on or about November 14, 1957, which was attended by the defendants and their co-conspirators, among others.

4. During the course of said conspiracy, as the said defendants and their co-conspirators well knew, following the aforesaid meeting, Grand Juries of the United States, duly impaneled and sworn in and for the United States District Courts for the Southern District of New York and elsewhere, began conducting an investigation into all of the material circumstances concerning the aforesaid meeting, and issued subpoenas directing the said defendants and their co-conspirators to appear before the said Grand Juries and give testimony and evidence.

5. During the course of said conspiracy, it was the belief of the defendants and their co-conspirators that the individuals who had been present at the aforesaid meeting would be questioned in connection with said investigation concerning the aforesaid meeting, with respect to its purpose, the number and identity of persons who were present, the arrangements preceding the aforesaid meeting, the conversations and other events which took place, and all the other circumstances surrounding the said occasion.

6. It was a part of the said conspiracy that the defendants and their co-conspirators, by false, fictitious and evasive testimony, and by other contumacious conduct, and by the commission of perjury, would conceal from the aforesaid Grand Juries and from other investigating bodies and agencies of the United States the fact that the aforesaid meeting had taken place, the purpose and advance planning of the aforesaid meeting, the number and identity of persons who were present on said occasion, the conversations and other events which took place, and all the other material circumstances surrounding the said occasion.

7. It was a further part of said conspiracy that said defendants and their co-conspirators, having taken oaths before competent tribunals, to wit, said Grand Juries, in matters in which a law of the United States authorizes an oath to be administered, that they would testify truly, would willfully and knowingly and contrary to said oath, state material matter which they did not believe to be true.

8. It was a further part of said conspiracy that said defendants and their co-conspirators would corruptly influ-

ence, obstruct and impede, and corruptly endeavor to influence, obstruct and impede the due administration of justice in the United States District Courts for the Southern District of New York and elsewhere, by giving false, fictitious and evasive testimony and by other contumacious conduct, and by the commission of perjury.

9. It was a further part of said conspiracy that the defendants would give and would corruptly influence the said co-conspirators and others to give false material information about the said meeting to investigating bodies and agencies of the United States, and give false, fictitious, fraudulent, vague, evasive and manufactured material testimony under oath about the aforesaid meeting before the said Grand Juries.

10. It was a further part of said conspiracy that said defendants and their co-conspirators would defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the United States in the investigation of violations of the laws of the United States and in the collection of information and evidence in matters in which the United States is or may be a party in interest.

OVERT ACTS

1. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 14th day of November 1957, in the Northern District of New York, JOSEPH BONANNO, a defendant herein, made a statement to members of the New York State Police.

2. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 14th day of November 1957, in the Northern District of New York, JOSEPH F. CIVELLO, a defendant herein, made a statement to members of the New York State Police.

3. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 14th day of November 1957, in the Northern District of New York, FRANK CUCCHIARA, a defendant herein, made a statement to members of the New York State Police.

4. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 14th day of November 1957, in the Northern District of New York, JOHN A. DEMARCO, a defendant herein, made a statement to members of the New York State Police.

5. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 14th day of November 1957, in the Northern District of New York, SALVATORE FALCONE, a defendant herein, made a statement to members of the New York State Police.

6. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 14th day of November 1957, in the Northern District of New York, JOHN T. SCALISH, a defendant herein, made a statement to members of the New York State Police.

7. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 14th day of No-

vember 1957, in the Northern District of New York, JAMES V. LA DUCA, a defendant herein, made a statement to members of the New York State Police.

8. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 14th day of November 1957, in the Northern District of New Jersey, JAMES OSTICCO, a defendant herein, made a statement to members of the New York State Police.

9. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 18th day of November 1957, in Newark, New Jersey, ANTHONY P. RIELA, a defendant herein, made a statement to officers of the New Jersey State Police and the Newark Police Department.

10. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 19th day of November 1957, in Nassau County, Mineola, Long Island, New York, JOHN ORMENTO, a defendant herein, made a statement to representatives of the District Attorney's Office, Nassau County.

11. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 20th day of November 1957, in New York City, NATALE EVOLA, a defendant herein, made a statement to officers of the New York City Police Department.

12. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 21st day of November 1957, in New York City, PAUL C. CASTELLANO, a

defendant herein, made a statement to officers of the New York City Police Department.

13. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 22nd day of November 1957, in New York City, CARMINE LOMBARDOZZI, a defendant herein, made a statement to officers of the New York City Police Department.

14. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 23rd day of November 1957, in New York City, MICHELE MIRANDA, a defendant herein, made a statement to officers of the New York City Police Department.

15. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 2nd day of December 1957, in Niagara Falls, New York, ANTONIO MAGADDINO, a defendant herein, made a statement to a representative of a subcommittee of the Joint Legislative Committee on Government Operations in New York State.

16. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 3rd day of December 1957, in Elizabeth, New Jersey, LOUIS A. LARASSO, a defendant herein, gave testimony to the County Court of Union County, New Jersey.

17. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 3rd day of December 1957, in Elizabeth, New Jersey, FRANK T. MAJURI, a defendant herein, gave testimony to the County Court of Union County, New Jersey.

18. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 27th day of January 1958, in Philadelphia, Pennsylvania, RUSSELL A. BUFALINO, a defendant herein, gave testimony at an Immigration and Naturalization Service hearing.

19. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 2nd day of September 1958, in Highland Park, New Jersey, JOSEPH IDA, a defendant herein, made a statement to an officer of the Intelligence Division, Internal Revenue Service, United States Treasury Department.

20. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 17th day of November 1958, in the Southern District of New York, JOSEPH MAGLIOCCO, a defendant herein, gave testimony to one of the aforesaid Grand Juries.

21. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 4th day of December 1958, in the Southern District of New York, Bartolo Guccia, a co-conspirator herein gave testimony to one of the aforesaid Grand Juries.

22. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 8th day of December 1958, in the Southern District of New York, IGNATIUS CANNONE, a defendant herein, gave testimony to one of the aforesaid Grand Juries,

23. In furtherance of the aforesaid conspiracy and to effect to objects thereof, on or about the 9th day of De-

cember 1958, in the Southern District of New York, Emanuel Zicari, a co-conspirator herein, gave testimony to one of the aforesaid Grand Juries.

24. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 13th day of January 1959, in the Southern District of New York, PASQUALE TURRIGIANO, a defendant herein, gave testimony to one of the aforesaid Grand Juries.

25. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 16th day of January 1959, in the Southern District of New York, ANGELO J. SCIANDRA, a defendant herein, gave testimony to one of the aforesaid Grand Juries.

26. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 23rd day of January 1959, in the Southern District of New York, PASQUALE TURRIGIANO, a defendant herein, gave testimony to one of the aforesaid Grand Juries.

27. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 23rd day of January 1959, in the Southern District of New York, JOHN C. MONTANA, a defendant herein, gave testimony to one of the aforesaid Grand Juries.

28. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 24th day of February 1959, in the Southern District of New York, Patsy Monachino, a co-conspirator herein, gave testimony to one of the aforesaid Grand Juries.

29. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 25th day of February 1959, in the Southern District of New York, Patsy Sciortino, a co-conspirator herein, gave testimony to one of the aforesaid Grand Juries.

30. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 25th day of February 1959, in the Southern District of New York, Patsy Monachino, a co-conspirator herein, gave testimony to one of the aforesaid Grand Juries.

31. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 10th day of March 1959, in the Southern District of New York, JOHN C. MONTANA, a defendant herein, gave testimony to one of the aforesaid Grand Juries.

32. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 17th day of March 1959, in the Southern District of California, FRANK A. DESIMONE, a defendant herein, refused to be sworn by a Federal Grand Jury.

33. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 16th day of April 1959, in the Southern District of California, SIMONE SCOZZARI, a defendant herein, gave testimony to a Federal Grand Jury.

34. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 29th day of April

1959, in the Southern District of New York, JOSEPH PROFACI, a defendant herein, gave testimony to one of the aforesaid Grand Juries.

35. In furtherance of the aforesaid conspiracy and to effect the objects thereof, on or about the 11th day of May 1959, in the Southern District of New York, Paul Scarcelli, a co-conspirator herein, gave testimony to one of the aforesaid Grand Juries.

(Title 18, Section 371, United States Code.)

COUNT II

The Grand Jury further charges:

1. That on or about the 17th day of November 1958, at the Southern District of New York and within the jurisdiction of this Court, JOSEPH MAGLIOCCO, defendant herein, having duly taken an oath before a competent tribunal, to wit, the Grand Jury of the United States of America, duly impaneled and sworn in and for the United States District Court for the Southern District of New York, and inquiring for that District in a matter then and there pending before said Grand Jury in which the law of the United States authorizes an oath to be administered, that he would testify truly, did unlawfully, knowingly and willfully and contrary to said oath, state material matter which he did not believe to be true, that is to say:

2. At the time and place aforesaid, the said Grand Jury, inquiring as aforesaid, was conducting an investigation en-

titled *United States v. John Doe*, concerning possible violations of the laws of the United States involved in a meeting held at the home of Joseph Barbara, Sr., in Apalachin, New York, on or about November 14, 1957, as is more fully described in paragraphs 3, 4 and 5 of Count I hereof, the allegations of which relating thereto are incorporated herein.

3. It was material to this investigation to ascertain the purpose of the aforesaid meeting, the names of persons who attended, whether their attendance was planned, and what events occurred thereat.

4. At the time and place aforesaid, the said JOSEPH MAGLIOCCO, appearing as a witness under oath, testified falsely before the said Grand Jury with respect to the aforesaid material matter, as follows:

> Q. You spoke earlier, Mr. Magliocco, about the affair at Mr. Barbara's house in Apalachin, New York, which was held November 14, 1957 and you started to tell us why it was you had gone up there, and I believe I cut you off because I wasn't particularly interested in it insofar as those questions were concerned, but I wish you would tell us now as you were starting to, why it was you were at Mr. Barbara's house on November 14, 1957. A. Well, I tried to tell you before and I tell you now that I didn't know that I was going to Mr. Barbara's house.
>
> Q. Didn't you know you were going there? A. No.
>
> Q. Well, when did you find out you were at Mr. Barbara's house? A. After.
>
> Q. After you had actually arrived there? A. After we left.

Q. Who told you you had been at Mr. Barbara's house? A. A state trooper.

Q. That was the first you had heard of the fact that— A. That I was in Mr. Barbara's house.

* * * * *

Q. And the first time you knew that you had been at Barbara's house was after you had left the following morning and the state troopers stopped you? A. As far as myself was concerned.

* * * *

Q. Tell us what happened when you pulled up to Mr. Barbara's house, what you saw, what Mr. Profaci said to you and what occurred? A. Mr. Profaci asked me if I wanted to go in with him, and I felt the way I feel now. I said, "No, thank you. I don't feel too well. I will stay in the car." Because I had no knowledge of the business that my brother-in-law had to discuss. But I know now that it was Mr. Barbara's house.

* * *

Q. You were at the home of Joseph Barbara on that day? A. Outside, in my car, yes.

Q. As you subsequently learned, there were a lot of other people who had been there on that day. A. After.

Q. Did you see any of those persons when you were at the home of Mr. Barbara? A. I didn't see a soul.

Q. Did you see any automobiles? A. I saw four or five cars and I thought they were the family's cars.

Q. Just four or five automobiles? A. Yes.

Q. You were completely unaware there was a party going on at the house? A. That's right.

* * *

Q. Now, to pick up where we left off, it's my understanding that it's your testimony that you did not know you were going to Mr. Barbara's house and, in fact, were not aware you had been there until you were informed of it after you had left the premises, and that, further, while you were there, you did not see anybody nor were you aware that there was a party going on? A. That's right.

Q. That's a correct statement of your testimony? Yes? A. Yes.

Q. Now, you say you arrived shortly before 12. How long did you stay at Mr. Barbara's house? A. Couldn't be more than about—less than an hour.

Q. It was definitely less than an hour? Could it have been as little as half an hour? A. Could have been. I mean I don't pay attention to it at all. I mean—

Q. Where were you when Mr. Profaci was in the house? A. In the car.

Q. You sat in the car all that while? A. That's right.

Q. Did you see anybody at all, other than Mr. Profaci, going and coming? A. No.

Q. Did you see any cars come in while you were parked there? A. I don't recall.

Q. You cannot recall any cars having come in? A. No.

Q. No? You have to speak a little louder. A. No, I just—the position of where I was standing, I didn't see no one nothing. I mean I was just reading a paper and I was sitting, I mean, I don't know. I didn't pay attention at all, but I couldn't say anything.

Q. All you could see was three or four, maybe five, cars at the most? A. Yes, I saw those cars parked. There was a little garage in to the house; there were cars parked there.

Q. Did you see any cars leave while you were out there? A. I—I don't—I don't pay attention if there was any car leaving. I mean I didn't know, because there was a road there somewhere, and I don't know.

The aforesaid testimony of JOSEPH MAGLIOCCO, as he then and there well knew and believed, was untrue, in that he did know, on November 14, 1957, that he was going to the home of Joseph Barbara, Sr., and that he did not stay outside in his parked automobile.

(Title 18, Section 1621, United States Code.)

COUNT III

The Grand Jury further charges:

1. That on or about the 29th day of April 1959, at the Southern District of New York and within the jurisdiction of this Court, JOSEPH PROFACI, defendant herein, having duly taken an oath before a competent tribunal, to wit, the Grand Jury of the United States of America, duly impaneled and sworn in and for the United States District Court for the Southern District of New York, and inquiring for that District in a matter then and there pending before said Grand Jury in which the law of the United States authorizes an oath to be administered, that he would testify truly, did unlawfully, knowingly and willfully and contrary to said oath, state material matter which he did not believe to be true, that is to say:

2. At the time and place aforesaid, the said Grand Jury, inquiring as aforesaid, was conducting an investigation, entitled *United States* v. *John Doe,* concerning possible

violations of the law of the United States involved in a meeting held at the home of Joseph Barbara, Sr., in Apalachin, New York, on or about November 14, 1957, as is more fully described in paragraphs 3, 4 and 5 of Count I hereof, the allegations of which relating thereto are incorporated herein.

3. It was material to this investigation to ascertain the purpose of the aforesaid meeting, the names of persons who attended, whether their attendance was planned, and what events occurred thereat.

4. At the time and place aforesaid, the said JOSEPH PROFACI, appearing as a witness under oath, testified falsely before the said Grand Jury with respect to the aforesaid material matter, as follows:

> Q. Mr. Profaci, you recall, I should imagine, a gathering which was held at the home of a Joseph Barbara in Apalachin, New York on November 14, 1957? A. Yes, I remember that.
>
> Q. Let me show you Mr. Barbara's picture so we're sure we're speaking about the same man. I direct your attention to Grand Jury Exhibit 3, page 3. This is the Joseph Barbara of Apalachin, New York. A. Yes, that's right.
>
> Q. You were at his house on the 14th of November, 1957, I believe? A. Yes.
>
> Q. How did you come to be there at that time? A. Well, see, if you permit, I want to explain.
>
> Q. Surely, go right ahead. A. I explain—I've explained after a week. After a week there, I was called and I explained what I want to explain to you if you permit me.

Q. We would certainly like you to tell us why you were there, Mr. Profaci. A. . . . So around about 8:30 or 4 on the 13th my brother-in-law pick me up at home and then we drove another road—he claimed another road, but the day was a bad day, rain, and don't feel good. We driving this way, the other way, and by 8 o'clock, 8:30, something like that, I see it myself, they made a mistake in the road. I recall we stopped at gasoline station and he asked where we are, and instead of go one way, he went another way. I heard that it's near Endicott, we're near Endicott. Go back take a long. When I hear Endicott, I say, "Say, Joe, I recall that Mr. Liberato",—the dead man, that one who die—"he used to see Barbara when he come around Endicott or this vicinity. How about you drove over there, pay a visit." I heard that he's a very sick man. It was explained to me he has a heart operation. Says. "All right, I do. Find out how and where."

So I recall the plant, asked if this—this Barbara has a plant, which he make Canada Dry, whatever they—bottle plant he got. So I called there and he tell me that the man is home sick, which I know he was sick, but he says, "He's home, sick." So he gave me the telephone, fellow who answered the phone, and I called the Barbara home and I told that I down here, "I would like to visit you." He says, "Come over," and they give me direction from where we was before, Binghamton, how to go to his place.

When I started knowing it was Apalachin (pronounced "Apalachia"), was when I called him. A little town they call Apalachin, and I started knowing it was Apalachin. My brother-in-law got my instructions, more or less; we got there on November the

14th. So that's how I went to Apalachin to see—visit Barbara.

Q. What time was it when you arrived there? A. Well, I couldn't remember right, but when I left where it was, it was about 10, 10:30, something like that.

Q. What time did you arrive there? A. I couldn't tell you right, but figure from where it was to the house, take about a little over one hour.

Q. About 11:30, thereabouts, you arrived? A. No, about a little later than that.

Q. Around 12 o'clock? A. No, between 11:30, something like that. I couldn't remember right.

Q. How long did you stay there? A. Not more than a quarter of an hour, if I remember right.

Q. So you left before 1 o'clock? A. I couldn't say right, but I—it wasn't over 1, something like that. I couldn't remember right.

Q. Did you go into the house? A. Yes.

Q. Mr. Magliocco go in with you? A. No, he don't want to get off the car because, you see, rain, dark, and he says, "Let me stay here because, you know, I'm sick. If I got a drink or something, it might be—bother me, so—"

Q. That is your brother-in-law's name, Joseph Magliocco? A. Yes sir.

Q. And he stayed out in the parked car while you went inside? A. He stay in the road, see. The road is down below, and I went in the house.

Q. We've got a picture here, which is Grand Jury Exhibit 26, and I wish you would indicate for us—first I'll ask you, do you recognize this as a picture of Mr. Barbara's home, and his garage, summer house, and the road out here? A. This is the road? This one, huh?

Q. Yes. A. My brother-in-law, he stay here.

Q. Could you put a "P" where you parked the car. Take the pen and mark with a letter "P" where you parked the car. A. This is the house?

Q. That's the house, yes. You recognize the house, don't you? A. I have an idea, but you know—see, my brother-in-law stop here.

Q. Would you mark it with a letter "P". A. Yes.

Q. That's on the right-hand side of the road. A. Coming this way. See, we went out this way, so he says, "I'll turn around," and I find him there when—

Q. You were coming up from the bottom of the picture in the lower right-hand corner? A. Yes.

Q. And up to here, you stopped on the right-hand side of the street on the edge of the picture. A. And that's his house.

Q. Could you put your initials right next to that letter "P" there. Would you please write your initials right below it—"J.P.," whatever you— A. That's it, J.P.

Q. Now, when you parked the car at this point you've indicated on the right-hand edge of the picture, how did you walk into the house from there? A. I don't recall, but I know that I walk into the house.

Q. Which side did you come in, from the far side or the side you can see here in the picture? A. I don't know. It's an entrance in the back there?

Q. I believe there is, but which entrance did you go in through? A. I don't recall. I know I went in.

Q. Now, when you pulled up here in the car and you passed this parking area, which is marked with the letter "E", were there any cars parked out in this parking area? A. Yes, I saw a few cars, yes.

Q. How many? A. I don't recall how many, but about three or four cars.

Q. Did you see any cars anywhere else on the property? A. I don't pay attention.

Q. Did you see many? A. Because I walk in, I stay with him about a quarter of an hour or so, and I walk right out; but I remember I see car.

Q. You saw three or four cars, you say? A. About that.

Q. How many people would you say you saw? A. Well, see, when I went out—when I went out, I see a few people, but I don't pay attention. I go right to see my brother-in-law.

Q. How many people did you see? A. About two or three in—but far away, see.

Q. Over by this fireplace here, over there? A. I couldn't recall.

Q. You don't recall where the people were standing? A. I don't recall. I see a few people, but I walk right out and join my brother-in-law.

Q. How many people did you see? A. I think I saw a few, but—

Q. Could it have been as many as five? A. No, no, I don't see.

Q. Less than five people you saw? A. Oh, sure.

Q. How many people did you see in the house? A. Barbara was alone in the chair, sick, and I saw an old man. He went.

Q. Was an old man in there with him, you say? A. Yes, but he was around, then he went away.

Q. Did he introduce you to the old man? A. No.

Q. Did you see anyone else in the house? A. No, nobody was there. He's in the chair.

Q. Did you talk to anyone while you were there, except to Mr. Barbara? A. No, only Mr. Barbara. I rushed right out because I was so—to take care—I went right out after the quarter of hour. We were talking about sicknesses, trouble, my sickness, his

sickness, the dead man that I told—I notify about the dead man; and I went right out.

Q. Now, from the time you arrived until the time you left, you say the only people you saw were Mr. Barbara and an old man in the house, and a few people— A. Far away.

Q. —less than five, far away. A. Far away, yes.

Q. You saw no one else at any time when you were on the Barbara premises? A. No.

Q. You're certain of that? A. Yes.

The aforesaid testimony of JOSEPH PROFACI, as he then and there well knew and believed, was untrue, in that he did observe more persons and more cars than he stated he saw, and Joseph Magliocco did not stay outside in an automobile.

(Title 18, Section 1621, United States Code.)

COUNT IV

The Grand Jury further charges:

1. That on or about the 13th day of January 1959, at the Southern District of New York and within the jurisdiction of this court, PASQUALE TURRIGIANO, defendant herein, having duly taken an oath before a competent tribunal, to wit, the Grand Jury of the United States of America, duly impaneled and sworn in and for the United States District Court for the Southern District of New York, and inquiring for that District in a matter then and there pending before said Grand Jury in which the law of the United States authorizes an oath to be administered, that he would testify

truly, did unlawfully, knowingly and willfully and contrary to said oath, state material matter which he did not believe to be true, that is to say:

2. That, at the time and place aforesaid, the said Grand Jury, inquiring as aforesaid, was conducting an investigation concerning possible violations of the laws of the United States involved in a meeting, and the circumstances surrounding that meeting, held at the home of Joseph Barbara, Sr., in Apalachin, New York, on or about November 14, 1957, as is more fully described in paragraphs 3, 4 and 5 of Count I hereof, the allegations of which relating thereto are incorporated herein.

3. It was material to this investigation, in determining the circumstances surrounding the aforesaid meeting, to ascertain the names of the persons who were present at the home of Joseph Barbara, Sr., on November 13, 1957, the day prior to the aforesaid meeting, what events occurred thereat, what was discussed, and what the purpose of their presence was.

4. At the time and place aforesaid, the said PASQUALE TURRIGIANO, appearing as a witness under oath, testified falsely before the said Grand Jury with respect to the aforesaid material matter by stating that no one was present at the Barbara residence between approximately 2:00 PM and 10:00 PM on November 13, 1957 except himself, the Barbara family and Melvin Blossom, as follows:

Q. From the time that you entered the house until the time that you finished eating, was Joseph Barbara with you every moment? A. Yeah, he was there.

Q. Did he leave the kitchen for any reason? A. No. We sat down to watch TV.

Q. But he didn't leave the room for any reason before? A. No. He was there all the time.

• • •

Q. And he was with you all the time? A. That's right.

Q. In your sight every minute? A. That's right.

• • •

Q. Well, you started to watch television at approximately six o'clock, is that right? A. More or less.

Q. Approximately? A. That's right.

Q. Did you watch television from approximately six to approximately ten o'clock? A. That's right.

Q. Was Joseph Barbara, Sr., in the same room with you all the time? A. Yes.

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Q. Was there anybody else in the living room between six and ten o'clock in the evening of November 13, 1957? A. Nobody.

Q. Did you see anybody else around the premises on that day, aside from the people that we have already discussed? A. There was the farmer over there, the one that took care of the place.

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Q. Did you see anybody else there? A. No, sir.

Q. All the time, between approximately two o'clock, when you arrived, and approximately ten o'clock when you left, you saw nobody else there except Joseph Barbara, Senior and Junior, Angie, Melvin Blossom and Mrs. Barbara, is that correct? A. That's right.

The aforesaid testimony of PASQUALE TURRIGIANO, as he then and there well knew and believed, was untrue, in that other persons were present at the Barbara residence between approximately 2:00 P.M and 10:00 PM on November 13, 1957.

(Title 18, Section 1621, United States Code.)

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Foreman

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ARTHUR H. CHRISTY
United States Attorney

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MILTON R. WESSEL
Special Assistant to the Attorney General